SUPREME COURT, U. S.

APR 17 1968

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1331

REVELLE W. BROWN, JOHN A. DIEMAND, DR. GILSON COLBY ENGEL, FRED FOX, WALTER S. FRANKLIN, WALTER B. GIBBONS, ESQUIRE, HUBERT J. HORAN, JR., ESQUIRE, DR. LOUIS P. HOYER, FREDERICK H. LEVIS, DAVID F. MAXWELL, ESQUIRE, MRS. MINA F. OLIVER, ROLAND RODROCK RANDALL and HARRY G. SCHAD, Trustees of the Estate of Stephen Girard,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA and ALAN LEVI BOND, by his mother, MRS. RUBY BOND, CHARLES WILLIAM HICKS and THEODORE LEWIS HICKS, by their mother, MRS. MARIE HICKS, JAMES SCRUGGS and HENRY SCRUGGS, by their mother, MRS. ARDELLA SCRUGGS, TYRONE KARL WHITE and TERRY SHERWOOD WHITE, by their mother, MRS. CHARLOTTE L. WHITE, on behalf of themselves and all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Trustees of the Estate of Stephen Girard, pray that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review the judg-

ment of that Court in affirming the Order of the United States District Court for the Eastern District of Pennsylvania.

OPINIONS BELOW

The Opinion of the United States District Court for the Eastern District of Pennsylvania, entered July 5, 1967 (App. A34-A53)[1], is reported at 270 F. Supp. 782. The Opinion and Concurring Opinions of the United States Court of Appeals for the Third Circuit, entered March 7, 1968 (App. A54-A72) are not yet officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on March 7, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED

If a governmental agency has been removed as trustee of a charitable testamentary trust for the care and education of "poor white male orphans" by the state court having jurisdiction, and private trustees have been appointed, all because this Court had held that the governmental agency, even though acting only in a fiduciary capacity, could not constitutionally so administer the gift; and if those private trustees have operated the charity for the testamentary beneficiaries during the past ten years without any governmental contacts except those common to

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[1]References to the Appendix included herewith shall be by "App." and the page numbers are preceded by an "A". References to the Appendix in the Court of Appeals shall be by an "R." and the page numbers are followed by an "a".

all such charities and institutions, does the equal protection clause of the Fourteenth Amendment require those trustees to enlarge the class of beneficiaries by admitting Negro children otherwise qualified?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent portion of the Fourteenth Amendment to the Constitution of the United States provides:

> "... No State shall ... deny to any person within its jurisdiction the equal protection of the laws."

The Pennsylvania Act of November 19, 1959, P. L. 1526, 20 Purdon's Pa. Stat. Ann. §§ 1144.1-1144.9, cited by the Court of Appeals, is set forth in full *infra* (App. A29-A33).

STATEMENT

This litigation is a sequel to similar related litigation that was concluded in this Court a decade ago. Both the prior and the present proceedings involve the constitutionality, in the light of the Fourteenth Amendment, of the provision in the Will of Stephen Girard, who died in 1831, which limited to "poor white male orphans, between the ages of six and ten years," the right to be admitted to the "College" or "Orphan establishment" for the construction and maintenance of which Girard left his residuary estate to the City of Philadelphia, its successors and assigns, as Trustee[2]. (R. 44a, 45a, 53a).

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[2]The institution opened in 1848 (R. 10a) under the trusteeship of the City of Philadelphia. Later, pursuant to the Pennsylvania Act of June 30, 1869, P. L. 1276, 53 Purdon's Pa. Stat. Ann. (1957) §§ 16365-16370, the administration of the College was transferred, together with that of other charitable trusts for which the City was Trustee, from the City to a Board of Directors of City Trusts created by the Commonwealth.

A. The Prior Related Litigation.

The prior related litigation was instituted on September 30, 1954 when several Negro boys, whose applications for admission to Girard College had been rejected because the applicants were not white, filed a Petition for Citation in the Orphans' Court of Philadelphia County to the Board of Directors of City Trusts which was then the trustee, to show cause why they should not be considered for admission to Girard College without discrimination based on race or color. The City and the Commonwealth intervened on the side of the applicants. After answer and hearing, the petitions were dismissed by the Hearing Judge, *Girard Estate,* 4 Pa. D. & C. 2d 671 (1955), and exceptions were later dismissed by the Orphans' Court *en banc* on January 6, 1956, 4 Pa. D. & C. 2d 708 (1956). The Orphans' Court held that the exclusion of Negroes from Girard College by the Board of Directors of City Trusts, pursuant to the explicit terms of Girard's Will, did not constitute "State action" prohibited by the Fourteenth Amendment, since the College is a private, not a public school, and the City, acting through the Board of Directors of City Trusts, was serving only in a fiduciary capacity.

The Supreme Court of Pennsylvania affirmed, *Girard Will Case,* 386 Pa. 548, 127 A. 2d 287 (1956), and in doing so pointed out, as had this Court, in another context, in *Vidal* v. *Girard's Executors,* 43 U. S. (2 How.) 127, 186-187 (1844), and in *Girard* v. *Philadelphia,* 74 U. S. (7 Wall.) 1, 13 (1868), and as had the Orphans' Court (4 Pa. D. & C. 2d 671, 714), that, if the City could not lawfully act as Trustee in carrying out Girard's dominant purpose to establish a private institution for poor white male orphans, the Orphans' Court should remove the City as

trustee and appoint a substituted trustee in its place. 386 Pa. at 566, 127 A. 2d at 295.

The Commonwealth, the City and the Negro applicants then appealed to this Court, which dismissed the appeal, but, treating it as a petition for certiorari, granted the writ and, without oral argument, reversed the judgment of the Supreme Court of Pennsylvania. The sole ground for doing so was that even though the City, acting through the Board of Directors of City Trusts, was merely serving as a trustee, its operation of the College was nevertheless as an agency of the Commonwealth, so that the Board's refusal to admit the Negro applicants solely because they were not white was accordingly discrimination by the State, forbidden by the Fourteenth Amendment. *Pennsylvania* v. *Board of Directors of City Trusts,* 353 U. S. 230 (1957), rehearing denied 353 U. S. 989. In its *per curiam* opinion, this Court did not direct that the Negro applicants be admitted. Instead it merely remanded the cause "for further proceedings not inconsistent with this opinion." For the convenience of this Court the opinion and order are reproduced in full in the Appendix hereto at pages A1-A2.

In turn, the Supreme Court of Pennsylvania vacated the decrees of the Orphans' Court and remanded the cause to that court for further proceedings not inconsistent with the opinion of this Court. *Girard Estate,* 7 Fiduc. Rep. (Pa.) 555 (1957). Thereafter, "in obedience to the mandate of the United States Supreme Court dated June 11, 1957, and the order of the Supreme Court of Pennsylvania filed June 28, 1957, and in conformity with the opinion of the Supreme Court of Pennsylvania, dated November 12, 1956," the Orphans' Court entered a decree dismissing the petitions of the Negro applicants for admission to Girard College, removing the Board of Directors of City Trusts as Trustee

of Girard's estate, effective upon the court's appointment of a substituted trustee, and directing the Board to transfer the records and assets of the estate to the substituted trustee promptly after the latter's appointment and qualification. *Girard Estate,* 7 Pa. Fiduc. Rep. 555, 558-559 (1957). For the convenience of this Court that opinion and decree are reproduced in full in the Appendix hereto at pages A3-A7. The Orphans' Court subsequently also denied petitions filed by the Negro applicants and by the City and Commonwealth for reconsideration and vacation of such decree. *Girard Estate,* 7 Fiduc. Rep. (Pa.) 608 (1957) (App. A3). The Orphans' Court at the same time entered a decree appointing thirteen individuals as Substituted Trustees of the estate. *Girard Estate,* 7 Fiduc. Rep. (Pa.) 606 (1957).

Again there was an appeal to the Pennsylvania Supreme Court, which affirmed on the ground that the Orphans' Court had properly construed the mandate of this Court and that the substitution of the private trustees for the public trustees to carry out Girard's intent was not itself "state action". *Girard College Trusteeship,* 391 Pa. 434, 138 A. 2d 844 (1958). This opinion is reproduced in full in the Appendix at A8-A27.

The Commonwealth, the City and the applicants once more appealed to this Court, arguing as a primary ground for reversal that this Court's mandate had been disregarded. This Court, again without oral argument, dismissed the appeal and, treating the appeal as a petition for certiorari, denied certiorari without opinion, *Pennsylvania* v. *Board of Directors of City Trusts,* 357 U. S. 570, *rehearing denied,* 358 U. S. 858 (1958), (App. A28).

Since the removal of the Board of City Trusts, the Girard trust has been administered solely by thirteen individual trustees appointed by the Orphans' Court.

B. The Nature of Girard College.

Girard College is located in North Central Philadelphia on a tract of ground approximately 43 acres in extent, which at the time of Girard's death, 137 years ago, was a farm outside the then city limits. There are about 25 buildings on the campus and the whole is surrounded by a stone wall 10 feet in height, as prescribed in the Will of Stephen Girard. There are only two gates in this wall, one being a service gate for deliveries only and the other being a main gate at which a watchman is constantly stationed. The public is not permitted in, and the children are not permitted out, except by special permission (R. 479a; Ex. D1, an aerial photograph).

No orphan boy is admitted into the institution until after the mother or guardian has made a formal written application and the boy has been examined by the resident doctor, the institution's psychologist, and tested for both intelligence and achievement. The mother, if any, is also interviewed by the institution's field representatives, or social workers. The Admissions Committee makes its recommendation as to each applicant to the President of the College who in turn makes his recommendation to the Trustees. Only the Trustees can approve final admission. From 25% to 30% of the applicants are rejected for psychological, intellectual or educational reasons (R. 479a).

Upon introduction into the institution, the mother or guardian of the orphan executes a document under which the legal custody and control of the orphan is transferred to the Trustees so long as the orphan remains in attendance at the institution. The Orphans' Court has also appointed the Trustees as guardians of the property of orphans during minority. Ordinarily the boys go to their homes for holidays, but if the boy's home has not been approved by the institution, he remains there continuously (R. 480a).

The institution provides elementary school and secondary school teaching on the premises (R. 246a). Admissions are accepted throughout the year up to March 31st (R. 254a).

The number of children attending the College is controlled by the amount of income available from Girard's residuary estate (R. 52a, 53a). Since it now costs about $3,000 per year to maintain and educate each child (R. 318a), the present enrollment is about 720 (R. 404a), whereas in 1933, when costs were much less, the enrollment was as high as 1739 (Ex. P-38).

The College is supported entirely by the income from the trust. It has never received funds from any governmental unit.

None of the thirteen individual Trustees has any governmental status. None of the employees of the estate is also an employee of the federal, state or city governments. No government official, city, state or federal, participates with the Trustees, or even advises the Trustees, in the administration of the trust (R. 761a-762a, 794a).

C. The Present Litigation.

The present litigation was instituted on December 16, 1965, when the Commonwealth of Pennsylvania, its Attorney General, the City of Philadelphia and seven poor male orphans between the ages of six and ten years, whose applications for admission to Girard College had been denied because the applicants are not white, as required by Girard's Will, filed a complaint (R. 4a-125a) in the United States District Court for the Eastern District of Pennsylvania to enjoin the Substituted Trustees of Girard's estate from refusing to admit the minor plaintiffs and other applicants to Girard College solely because of their race. The minor plaintiffs sued on behalf of themselves and all others similarly situated. Jurisdiction of the District Court was asserted

under 28 U. S. C. §§ 1331 and 1343(3) and 42 U. S. C. §§ 1981 and 1983.

The Complaint was in three Counts. Count I charged that the denial of admission to the minor plaintiffs because they are not white, as required by Girard's Will, violated their constitutional right under the Fourteenth Amendment to the equal protection of the laws. Count II sought to have the cy pres doctrine applied on the theory that Girard's dominant purpose in providing for the orphan establishment was to benefit the City, which now has a great need for facilities to educate and train Negro children, and that Girard's basic purpose can only be achieved by admission of Negroes. Count III was based on the theory that exclusion from the orphan establishment on the basis of race violated the Pennsylvania Public Accommodations Act of June 24, 1939, P. L. 872, § 654, 18 Purdon's Pa. Stat. Ann. § 4654.

The defendant Trustees (Petitioners here) moved to dismiss the Complaint on a number of grounds, including res judicata and lack of jurisdiction (R. 126a). On December 2, 1966 the District Court (per Joseph S. Lord, III, J.) filed its opinion and order generally denying defendants' motion. *Commonwealth of Pennsylvania* v. *Brown,* 260 F. Supp. 323 (E. D. Pa., 1966) (R. 132a). Thereafter, following the filing of defendants' Answer, hearings were held on Count III, the Public Accommodations Act Count. On November 2, 1966 Judge Lord entered an opinion and final injunction under that Count. *Commonwealth of Pennsylvania* v. *Brown,* 260 F. Supp. 358 (R. 477a). However, the Court of Appeals for the Third Circuit vacated that order on the ground that the Pennsylvania courts had already held that the Pennsylvania Public Accommodations Act does not apply to Girard College; and the case was remanded to the District Court so as to permit it to continue

with further proceedings relating to Count I, the Constitutional Count. *Commonwealth* v. *Brown,* 373 F. 2d 771 (3rd Cir. 1967). (R. 525a-555a).

The District Court then held hearings on Count I, and on July 5, 1967, entered a decree ordering that the action should be maintained as a class action, the class to consist of all poor male orphans who would be eligible for admission to Girard College except for the fact that they are not white, and permanently enjoining defendants from denying admission to Girard College to any members of such class on the ground of their not being white. *Commonwealth of Pennsylvania* v. *Brown,* 270 F. Supp. 782 (App. A34-A53).

The Court of Appeals for the Third Circuit affirmed the District Court on March 7, 1968 (App. A54-A65). The opinion of the Court of Appeals was written by McLaughlin, Circuit Judge. Concurring opinions were filed by Circuit Judges Kalodner and Van Dusen (App. A66-A72).

The defendant Trustees now petition this Court for a writ of certiorari to review the judgment of the Court of Appeals. Pending the disposition of this petition the Court of Appeals has continued the stay of the District Court's order.

REASONS FOR GRANTING THE WRIT

In a classic understatement, the District Court observed that some of the constitutional questions presented by the Complaint in this case "are on the frontier of the Fourteenth Amendment." *Commonwealth* v. *Brown,* 260 F. Supp. 323, 332 (E. D. Pa. 1966) (R. 142a).

The fact is that the decision of the Court of Appeals extends well beyond that frontier, as it has been delineated by this Court. Thus:

(1) The majority and one of the concurring judges of the Court of Appeals have held that the appointment of substitute trustees by the Orphans' Court in performance of its customary judicial duty, so that they might carry out Girard's intent, was denial of the equal protection of the laws under the principle of *Shelley* v. *Kraemer,* 334 U. S. 1 (1948), although this Court has not yet extended that rule to encompass an unwilling seller, or in this case testator and trustees, and even though the Solicitor General's argument in *Evans* v. *Newton,* 382 U. S. 296 (1966) that the rule should be applied to the substitution of trustees was pointedly ignored.

(2) The majority has also held that this case is governed by *Evans* v. *Newton,* supra, although in that case the decision was based (a) on the absence of proof that the mere substitution of private trustees would bring about a change in the municipal maintenance and concern over the park, whereas in this case, it is undenied that in the ten years since the appointment of private trustees there has been no municipal or other governmental involvement in the administration of the school or trust; and (b) on the public nature or function of the open park, whereas in this case, the school is both economically and physically private, and this Court has not held that such education is a public function.

If *Shelley* and *Evans* are to be extended to prevent the implementation, through the use of long-established judicial procedures, of a donor's completely private choice of a limited class of beneficiaries, or if private and parochial schools are to be subjected to the same constitutional limitations that apply to public schools because education is a "public function", it is this Court which should say so, and then only after full consideration of the merits.

Moreover, this Court should also declare the significance of its denial of certiorari in the second Girard appeal, after having remanded the case without a direction to admit the Negro applicants. Although the rule in the ordinary case is that the denial of certiorari implies nothing as to the merits, it would seem that when a second petition raises the issue of compliance with a prior mandate, the denial necessarily constitutes approval of the lower court's response to that mandate. It is impossible to conceive that this Court would have been so indifferent to the rights of the Negro applicants that it would have permitted the Pennsylvania courts to refuse their admission and to appoint private trustees, unless this Court had been of the opinion that the appointment was consistent with its mandate and that the private trustees could thereafter constitutionally carry out Girard's intent.

The questions involved are substantial and of major future significance to the administration of estates, to judicial procedures and to the role of non-public education.

I. The Meaning and Effect of This Court's Mandate and Subsequent Denial of Certiorari in the Prior Litigation Are Peculiarly For This Court's Decision.

In the prior litigation this Court first held that the Board of Directors of City Trusts was an agency of the Commonwealth of Pennsylvania and therefore, even though the Board was acting only as a trustee, its refusal to admit the minor plaintiffs to Girard College because they were not white was unconstitutional discrimination forbidden by the Fourteenth Amendment. Accordingly, this Court reversed the judgment of the Supreme Court of Pennsylvania and remanded the cause "for further proceedings not inconsistent with this opinion." *Pennsylvania* v. *Board of*

Directors of City Trusts, supra (App. A2), rehearing denied 353 U. S. 989. In issuing its mandate in that form, rather than directly ordering that the Negro applicants be admitted to the institution, as had been done in *Sweatt* v. *Painter,* 339 U. S. 629 (1950), and *Brown* v. *Board of Education,* 349 U. S. 294 (1955), this Court was presumably fully aware of the reiterated principle, both in its own opinions and in those of the Supreme Court of Pennsylvania and the Orphans' Court of Philadelphia, that if for any reason the Trustee of Girard's estate (i.e., the City, acting through the Board) did not have legal capability to carry out Girard's wishes in respect of the College, another trustee without constitutional limitations should be substituted in the City's stead. *Vidal* v. *Girard's Executors,* 43 U. S. (2 How.) 127, 186-187 (1844); *Girard* v. *Philadelphia,* 74 U. S. (7 Wall.) 1, 13 (1868); *Girard Will Case,* 386 Pa. 548, 566, 127 A. 2d 287, 295 (1956); *Girard Estate,* 4 Pa. D. & C. 2d 671, 714 (1955).[3] Since this Court had ample foreknowledge that in the event of the City's constitutional incapacity to carry out the Girard College trust, the Orphans' Court would be under a legal duty to substitute a trustee who would have the necessary capacity

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[3]The following statement by the Pennsylvania Supreme Court had left no doubt as to what it would do unless directed otherwise by this Court (386 Pa. at 566):

> "But finally, even if the Board of Directors of City Trusts *were* deemed to be engaged in 'State action' in the administration of the Girard trust, petitioners would nevertheless not be entitled to the remedy they seek. If the city, because bound in its public or governmental actions by the inhibition imposed upon it by the Fourteenth Amendment, cannot carry out a provision of Girard's will in regard to the beneficiaries of the charity as prescribed by him, the law is clear that the remedy is, not to change that provision, which, as an individual, he had a perfect right to prescribe, but for the Orphans' Court, which has final jurisdiction over the trust which he created, to appoint another trustee."

unless directed not to do so, it is a reasonable inference that by the failure to provide otherwise in its mandate this Court approved in advance the subsequent action of the Orphans' Court in removing the Board of Directors of City Trusts as Trustee and substituting in its place thirteen individual trustees.

This interpretation of the mandate is necessarily confirmed by this Court's subsequent refusal to review the decision of the Pennsylvania Supreme Court despite the argument that the Orphans' Court had disobeyed this Court's mandate by denying the petitions of the Negro applicants. *Girard College Trusteeship,* supra, cert. den. sub nom. *Pennsylvania* v. *Board of Directors of City Trusts,* 357 U. S. 570, rehearing denied 358 U. S. 858.

The Court of Appeals in the present case brushed aside the necessary implication of this Court's denial of certiorari in the second appeal. In doing so the Court of Appeals simply invoked the ordinary rule that no inference is permissible, favorable or unfavorable, from the denial of an application to this Court for a writ of certiorari. However, while it is certainly true that in the usual case the denial of a petition for certiorari is without significance on the merits, no precedent exists for applying that rule when the issue is whether a *prior mandate* has been obeyed. On the contrary, what cases there are show, as one would expect, that this Court will tolerate no avoidance or misinterpretation of its orders.

In *Florida ex rel. Hawkins* v. *Board of Control,* 347 U. S. 971 (1954), this Court had reversed and remanded a law school desegregation case "for consideration in the light of" the *Brown* case without further explanation. The lower court did not take prompt steps to effect the admission of the Negro applicant, and the case was again appealed. *Florida ex rel. Hawkins* v. *Board of Control,* 350 U. S. 413

(1956). This Court granted certiorari, recalled and vacated its prior mandate, and in lieu thereof issued an order directing the applicant's admission without delay if otherwise qualified. That is what this Court would presumably also have done in the second Girard appeal if it had believed its mandate had been avoided by the substitution of private trustees, particularly when the State court's interpretation of the mandate and the reasons therefor were so clearly stated. Again, as recently as last year this Court reversed and remanded in the second appeal of an anti-trust case on the ground that the action of the lower court in response to its first order "does the opposite of what our prior opinion and mandate commanded." *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U. S. 129 (1967).

The Court of Appeals has attempted to avoid the conclusion that by denying certiorari this Court necessarily found that its mandate had not been disregarded or circumvented, by saying that the "then existing state litigation picture" presented to this Court on the second appeal was "muddy" and not in "sharp focus". (App. pp. A62-63). But, to the contrary, the situation was crystal clear. The opinion of the Orphans' Court under review stated that in order to harmonize the opinions of the United States Supreme Court and the Pennsylvania Supreme Court with Girard's primary purpose to benefit "poor white male orphans" only, the City must be removed as trustee and the petitions of the two negro applicants must be denied. The order itself dismissed the applicants' petitions (App. A6-A7). The Jurisdictional Statement to this Court specifically raised the question whether denial of admission to the applicants because of their color was in compliance with this Court's prior mandate. It could not have been more obvious that denial of certiorari would permanently prevent the admission of the Negro applicants; and if the prior opinion

and mandate of this Court had been intended to direct their admission, regardless of the identity of the trustee, there can be no doubt that certiorari would have been granted.[4] See *Florida ex rel Hawkins* v. *Board of Control,* supra.

II. The Court of Appeals Has Erroneously Extended the Doctrine of *Shelley* v. *Kraemer*.

Although the majority opinion is diffuse in its reasoning, it would seem that the principal basis for affirmance of the District Court is that the substitution of the private trustees for the governmental trustee, to permit the continued effectuation of Girard's purpose, itself constituted "state action."[5] In support thereof, there is cited *Shelley* v. *Kraemer,* 334 U. S. 1 (1948).

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[4]In *Evans* v. *Newton,* 382 U. S. 296 (1966), the Solicitor General, appearing for the United States as amicus curiae, argued in his Brief (pp. 11-12) that the denial of certiorari in the second *Girard* appeal might have been on the ground that it was not clear that the private trustees would or could operate the College on a segregated basis because the Pennsylvania Public Accommodations Act, 18 Pa. Purd. Stat. Ann. § 4654 expressly forbids racial discrimination in schools. However, a review of the Jurisdictional Statement and briefs filed with this Court in the second *Girard* appeal shows that the Pennsylvania Accommodations Act was never cited and, even more significant, the argument overlooks the fact that the issue in the second *Girard* appeal was the dismissal of the petitions of the two applicants and not the fate of future applicants.

[5]On the other hand, the District Court held that the substitution of Trustees was not of itself unconstitutional state action prohibited by *Shelley* (R. 854a-856a). That Court, however, found state action in the "continuing interest" of the Orphans' Court in the administration of the trust (R. 862a-863a); but in so doing it also committed error because of lack of understanding of Orphans' Court practices. It would have been inconceivable for the Orphans' Court to have appointed trustees without first ascertaining that they would serve; the regular accounts are for convenience in settling the estate of a deceased trustee; and the certificates of appointment are the only forms of recognition that the trustees, who serve without compensation, have received. No member of the Orphans' Court has ever involved himself in the administration of the College (R. 674a); and the docket entries show that the Court has dealt only with purely routine matters of trust administration (Ex. D-11).

This is the first case in which the doctrine of *Shelley* has been extended to prevent the exercise of traditional judicial power to make possible the exercise of a purely private decision to distinguish between races. In *Shelley,* and in the subsequent similar case of *Barrows* v. *Jackson,* 346 U. S. 249 (1953), the seller of the real estate subject to the racially restrictive covenant wished to ignore the covenant and to sell to the prospective Negro buyer. It was quite properly held that the state, acting through the judicial branch, could not prevent the transaction since, because of the willingness of the seller, the Negro buyer had a constitutionally protected civil right to buy. To the same effect is the *Sweet Briar Institute* litigation incorrectly relied upon by the majority (App. A64). In that case, unlike the present one, the trustees of Sweet Briar were willing to ignore the testamentary restriction to "white girls and young women", and the state attorney general was properly enjoined from instituting proceedings to compel them to adhere to the restriction. *Sweet Briar Inst.* v. *Button,* 387 U. S. 423 and, on remand, 12 Race Rel. L. Rep. 1188 (not officially reported).

Those decisions are vastly different from the present holding which, in effect, denies to an individual the use of expected judicial procedures for the implementation of a personal gift to a specified class of beneficiaries. Despite the surmise in the majority opinion that Girard would be "quietly happy" that the College is being opened to nonwhites (App. A65), the fact remains that Girard said "white",[6] that there is no evidence that he would be of a different mind today, that the Trustees are unwilling to deviate from his directions, and that therefore in the lexicon of the *Shelley* doctrine there is no willing seller to create a right in these applicants.

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[6]The Pennsylvania courts have held that Girard's principal purpose was to benefit only "poor white male orphans". (App. A5-A6).

In the opinion of the Pennsylvania Supreme Court sustaining the substitution of trustees as being consistent with this Court's mandate and also as being constitutional itself, this subject is examined at length (App. A19-A26). Although the entire discussion should be considered, the following excerpts will show the basis for the Pennsylvania Supreme Court's decision:

> "No useful purpose would be served by discussing at greater length the jurisdiction of the Orphans' Court over testamentary trusts and their fiduciaries or the power of that court to remove a trustee who is incapable or fails or refuses to carry out a trust as its creator directed. Such a situation calls for the removal of the incapable trustee and the substitution of a fiduciary able to administer the trust as its provisions require; and the jurisdiction and power of the Orphans' Court to that end is not open to question. Here, there is a conclusively adjudicated want of capacity in the Board of City Trusts to administer Girard College in accordance with the intention and directions of the testator's will. There was, therefore, nothing other for the Orphans' Court to do in the circumstances but to remove the inhibited trustee and appoint trustees capable of administering the College as Stephen Girard intended and prescribed." (App. A19)

> "The undisputed facts in the *Shelley* case made it clear that, but for the active intervention of the State court, the Negro purchasers would have been free to occupy the properties in question without restraint. Thus, the State had made available to the covenantees the full coercive power of govern-

> ment to deny to the Negro purchasers, on the ground of race or color, their constitutional right to own and enjoy property which they were willing and financially able to acquire and which the grantors were willing to sell. As contrasted by the Supreme Court, 'The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to the petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.' In the instant case, no one not possessing the qualifications prescribed by Girard's will for admission to the Orphanage can claim any right that entitles him to share Stephen Girard's largesse on an equal, or any, footing with those whom Girard himself expressly made the beneficiaries of his bounty." (App. A21)

This Court declined to review that decision by the Pennsylvania Supreme Court, and since the present holding of the Court of Appeals is directly contrary, certiorari should now be granted.

III. The Court of Appeals Has Erroneously Extended the Holdings in *Evans* v. *Newton*.

The majority of the Court of Appeals has said that it must agree with the District Court that "the facts in *Evans* v. *Newton*, 382 U. S. 296, 301, 302 (1966) are fairly comparable to those in this appeal and that the decision of the Supreme Court therein governs the issue before us" (App. A63).

Evans involved an open park in Macon, Georgia, which in 1911 had been left in trust to the City for the use of white people only. Following the decision of this Court in the

first Girard case, the City of Macon, realizing it could not constitutionally carry out the purpose of the testator, resigned and three individual trustees were appointed by the appropriate court. The Supreme Court of Georgia affirmed, but, on certiorari, this Court reversed.

Before considering the applicability of the rationale of that decision to this case, it is of importance to note what this Court did not do in *Evans*. This Court did not adopt the argument of the Solicitor General that the Georgia state court's acceptance of the City's resignation and the appointment of private trustees, for the purpose of carrying out the testator's discriminatory intent, was itself unconstitutional state action. (See Brief for the United States as Amicus Curiae, pp. 25-26 in that case). It would have been a simple matter for this Court to have decided on that basis if the Solicitor General's argument had been considered sound. The fact that this was not done argues strongly against acceptance of the Court of Appeals' opinion in this case which, as we have seen, is based largely on this theory.

The actual opinion in *Evans* has two facets, one of which is clearly not applicable here and the other of which would have far-reaching and dangerous consequences if applied here.

A. Unlike Evans, the record in this case shows that Girard College has been totally divorced from municipal responsibility or concern since the appointment of private trustees.

The first ground for the decision in *Evans* was that the City had for years maintained the park as a part of its public park system—"it was swept, manicured, watered, patrolled and maintained by the city as a public facility for whites only"—and this Court would not assume that the mere appointment of private trustees would change that

situation. As was said: "The momentum it acquired as a public facility is certainly not dissipated *ipso facto* by the appointment of 'private' trustees. So far as this record shows, there has been no change in municipal maintenance and concern over this facility." 382 U. S. at 301.

The record in the Girard College case is totally different. There can be no doubt that Girard College was completely divorced from its former city relationship in 1959. No State or City officer or appointee has participated in the operation of the College since then, almost ten years ago (R. 761a-762a, 794a, 783a). Not a penny of City or State money has ever been used for its support (R. 847a, 869a). None of its property is now or ever was owned by the City or State. No State or City legislation fosters, protects or directs it. As a private school and as an orphanage its relationships with the City and State are only those applicable to every unlicensed private or parochial school and all other charitable child care agencies.[7] The separation was and is complete.

To the extent that the basis for *Evans* was that the future relationship between the City and the park could not be foretold, that basis certainly does not exist here because the record is a matter of fact and not forecast.

B. The Court of Appeals has incorrectly extended the Evans concept of public function to private schools.

The second ground for the *Evans* decision is that an open park such as Baconsfield is performing a "public function", is in the "public sector" or "public domain" and, like the company town in *Marsh* v. *Alabama*, 326 U. S. 501 (1946), must be operated under constitutional restrictions.

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[7]The insubstantiality of these relationships will be dealt with fully if the writ is granted.

Although in *Evans* this Court was careful to say that it was not equating private or parochial schools with parks, (citing *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925) for the right to maintain a parochial school), the opinion of the Court of Appeals makes no such distinction. Instead, by quoting merely the statement of Mr. Justice Douglas in the majority opinion that "the public character of this park requires that it be treated as a public institution" (App. A62), a strong inference is created that the court is holding that the function of education is also public for constitutional purposes.

This must be the conceptual breadth of the Court of Appeals' holding because factually Girard College cannot be likened to Baconsfield Park. The Brief of the United States in *Evans* shows that the park is approximately 100 acres in extent, is located in the center of Macon, is open on all sides, is segmented and traversed by a number of public streets and at least one major highway, and might be visited freely by all members of the public except Negroes. Save for that one exception, it is to all intents and purposes an ordinary public park maintained by the municipality just as all its other public grounds. Girard College, on the other hand, is surrounded by a high stone wall; only about two-thirds of the applicants are approved for admission; members of the public are not even allowed on the campus without special permission; and, in short, it is totally dissimilar to a public school or any other public facility (Supra, pp. 7-8).

The implications of a holding that education is per se public for the purposes of the Fourteenth Amendment, and therefore the First Amendment also,[8] would be far-reaching. Education in the United States is traditionally private and parochial, as well as public. The patterns thereby created

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[8] *Abington School District* v. *Schempp,* 374 U. S. 203 (1963).

have become a part of the fabric of our social and religious life. If the freedom of selection which is essential to the continued existence of these non-public schools is to be eliminated, either directly or by erosion, and through judicial rather than legislative power, this Court should accept the responsibility.

IV. The Court of Appeals Has Erroneously Extended the Doctrine of *Reitman* v. *Mulkey* to the Neutral Exercise of Traditional Judicial Power.

The majority of the Court of Appeals has said that the action of the Orphans' Court in replacing the City with private trustees significantly encourages and involves the state in private discrimination, citing *Reitman* v. *Mulkey,* 387 U. S. 369 (1967) (App. A65). And Judge Van Dusen places his concurring opinion almost solely on *Reitman* (App. A70).

There is certainly no factual relationship between this case and *Reitman,* and it is difficult to see any conceptual relationship. In *Reitman* this court affirmed a California Supreme Court decision striking down an amendment to the California constitution, adopted by referendum, which provided that neither the State nor any subdivision or agency thereof may deny to any person the right to decline to sell or rent his real property to any person with whom he does not wish to deal. The basis for the decision appears to be that this amendment encouraged discrimination by according the right to discriminate a special status, immune from legislative, executive or judicial power.

Here the Orphans' Court merely performed its traditional duty of replacing a legally incompetent trustee with one who was capable of carrying out the testator's intent. There is no evidence or inference that by so doing the court

encouraged members of the public to discriminate on racial grounds in the testamentary disposition of their own property. And what is even more pertinent, the action of the court did not affect the power of the legislature to enact a law prohibiting discrimination because of race in every school in the state, nor did it confer a special status on the new trustees so as to make it impossible for them to ignore Girard's limitation if they should ever decide to do so.

The only realistic statement that can be made about the action of the Orphans' Court is that it thereby made possible the continuance of Girard's personal preference. But if that is unconstitutional state involvement, then so is the probate of any will making a gift to a class defined by reference to color or creed. In each instance judicial power is essential to the effectuation of the gift.

Judge Van Dusen also cited the Pennsylvania Act of November 19, 1959, P. L. 1526 (20 Purd. Pa. Stat. §§ 1144.1-1144.9) as being even clearer "encouragement" (App. A71). But he is in error in stating that this Act "authorized *ex post facto* the Orphans' Court's actions. . . ." (App. A71), if, by so saying, he means that the legislation retroactively authorized, or even approved, the substitution of trustees of the Girard Estate. The Act makes no reference whatsoever to the change in trustees of the Girard Estate or affects in any way the powers of those trustees in administering that estate.[9] Instead it provides that where a political subdivision holds property in a fiduciary capacity for *minors*, the local Orphans' Court is empowered to appoint a substitute fiduciary. This Act is applicable to the property of any minor, regardless of color. Although it probably was passed because the City was no longer the

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[9]The majority opinion refers approvingly to a statement in the District Court's opinion that this Act contained other enabling legislation "without which the present defendants would be unable to carry out their duties" (App. A58, fn. 1). This is not so.

trustee of the Girard Estate, and thus there was no point in the City continuing as the appointed guardian of the property of the orphan boys attending the College, it cannot be said fairly that this encouraged or even condoned discrimination.[10]

Certainly the principle of *Reitman*, that discrimination or the right to discriminate cannot constitutionally be given a preferred or protected status, is not applicable factually or conceptually to this case.

V. The City's Historical Relationship Does Not Create Present State Action.

A subsidiary reason seemingly advanced by the Court of Appeals for its decision is the history of City trusteeship, which is summarized in a quotation from the District Court's opinion (App. A57).

It would not be appropriate in this petition to deal with the insufficiency of those state contacts individually, as will be done fully if certiorari is granted. At this stage it should be enough to show the desirability of an inquiry in depth by pointing out that none of those relationships, except the ones common to all public charities, such as tax exemption

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[10]Nor is there any possibility that legislative policy might have encouraged Girard's original choice to limit his bounty to the white race, as was the case in *Evans*. In Pennsylvania the official policy was expressed in the Act of March 1, 1780, which, after declaring that all persons of all colors and features "are the work of an Almighty Hand," provided for the gradual abolition of slavery (R. 840a-841a). This policy of equality to all regardless of color was carried into the Pennsylvania school laws. Beginning in 1802 with the passage of the first Act to provide for free education of pauper children and continuing until Girard's death in 1832, none of the many statutes creating and regulating public schools made any distinction between pupils on the ground of race, creed or color. (Ex. D-11 contains all of the Pennsylvania Acts relating to schools passed prior to Girard's death.)

and former exemption from tort liability, has a present effect upon the trust or the College.[11]

The effort of the Court of Appeals to create the impression that there is a present benefit to the College from the City's former trusteeship because the amount of the trust fund is due to the "consistently brilliant showing" of the City as trustee (App. A57) is not supported by the record. A legislative committee appointed in 1842 because of public dissatisfaction with the City's performance as trustee reported there had been a loss of $900,000 through neglect and mismanagement. Herrick, *History of Girard College*, 22-23 (1923). From the commencement of the trust to 1959 when the City was discharged, the book value of the assets increased $66,091,592, but $61,350,241, or more than 90%, is made up of royalties received from coal lands wisely purchased by Girard just prior to his death, and which were acounted for as additions to capital rather than income (Ex. P-44, pp. 86, 87; R. 760a-761a). There is no evidence from which it can be concluded that the estate is any different in kind or amount than it would have been in the hands of non-governmental trustees.

Also, it has been determined as a matter of state law that the ancient statutes and ordinances which no longer have any significance but upon which the plaintiffs have relied to show present state involvement were either designed to enable the state and city to qualify for their bequests or were purely administrative measures not required by

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[11]It is inherent in the *Evans* opinion that a long history of state participation through municipal trustees, and even through municipal maintenance, does not constitute *present* state involvement if that relationship is fully terminated. This Court merely said that it could "not take judicial notice that the mere substitution of trustees" would terminate the relationship completely. (382 U. S. at 301). If the mere history of state involvement creates state action for all time, there would have been no point in considering the nature of the park and the future role of the City.

Girard's will. *Girard College Trusteeship,* (App. A15-A16). It is also a matter of state law that the City had no governmental relationship to the trust but acted solely as a fiduciary, just as would a private trustee. *Girard Will Case.,* supra. Accordingly, the assets were never impressed with the governmental characteristics of the City, and the removal of the City from its position as trustee completely terminated state involvement.

CONCLUSION

The questions presented by this proceeding are of such a nature that they can be resolved only by this Court. If denial of a petition for certiorari has no substantive significance when the principal issue is compliance with a prior mandate, the bench and bar should be informed by the only Court truly qualified to speak. If the performance by the Orphans' Court of its traditional judicial duty, which did not compel unwilling compliance with the restrictive gift, is unconstitutional state action, the implications are so broad that this Court should express its opinion. If education has become such a "public function" that it must be conducted by private persons within the limits of the Fourteenth Amendment, the ramifications are such that only this Court should say so.

In considering the importance of these questions, and particularly in considering the total effect of the District Court's order upon the concept of private choice, there should be kept in mind the fact that neither Girard, nor the Orphans' Court, nor the trustees have denied any orphan child the right to maintenance at public expense and a public school education in a non-segregated school. What Girard intended was that some children, "poor white male orphans" should receive his bounty. This was a personal choice which, in turn, created rights in that designated class. The Penn-

sylvania courts, applying long established principles, have acted to preserve the right of the donor to give and the right of the designated class to receive that gift undiluted by the inclusion of others. In doing so, they have also confirmed the rights of all donors and all classes of beneficiaries no matter what their race, creed or color might be.

For the foregoing reasons the Petition for Certiorari should be granted.

Respectfully submitted,

ARTHUR LITTLETON

JOHN RUSSELL, JR.

ERNEST R. VON STARCK

RICHARD P. BROWN, JR.

Opinion and Order of the United States Supreme Court (4/29/57)

UNITED STATES SUPREME COURT

PENNSYLVANIA ET AL. *v.* BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY OF PHILADELPHIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

No. 769. Decided April 29, 1957.

(353 U. S. 230)

PER CURIAM.

The motion to dismiss the appeal for want of jurisdiction is granted. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was taken as a petition for writ of certiorari, 28 U. S. C. § 2103, the petition is granted. 28 U. S. C. § 1257 (3).

Stephen Girard, by a will probated in 1831, left a fund in trust for the erection, maintenance, and operation of a "college." The will provided that the college was to admit "as many poor white male orphans, between the ages of six and ten years, as the said income shall be adequate to maintain." The will named as trustee the City of Philadelphia. The provisions of the will were carried out by the State and City and the college was opened in 1848. Since 1869, by virtue of an act of the Pennsylvania Legislature, the trust has been administered and the college operated by the "Board of Directors of City Trusts of the City of Philadelphia." Pa. Laws 1869, No. 1258, p. 1276; Purdon's Pa. Stat. Ann., 1957, Tit. 53, § 16365.

In February 1954, the petitioners Foust and Felder applied for admission to the college. They met all quali-

fications except that they were Negroes. For this reason the Board refused to admit them. They petitioned the Orphans' Court of Philadelphia County for an order directing the Board to admit them, alleging that their exclusion because of race violated the Fourteenth Amendment to the Constitution. The State of Pennsylvania and the City of Philadelphia joined in the suit also contending the Board's action violated the Fourteenth Amendment. The Orphans' Court rejected the constitutional contention and refused to order the applicants' admission. 4 D. & C. 2d 671 (Orph. Ct. Philadelphia). This was affirmed by the Pennsylvania Supreme Court. 386 Pa. 548, 127 A. 2d 287.

The Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment. *Brown* v. *Board of Education,* 347 U. S. 483. Accordingly, the judgment of the Supreme Court of Pennsylvania is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Opinion and Order of Philadelphia Orphans' Court (9/11/57)

GIRARD ESTATE—PHILA. ORPHANS' COURT
(7 FIDUCIARY REP. (PA.) 555)

OPINION BY KLEIN, P. J., SEPTEMBER 11, 1957:

This matter is again before us as the result of a mandate of the United States Supreme Court and an order of the Supreme Court of Pennsylvania entered pursuant thereto.

The United States Supreme Court, in its per curiam opinion dated April 29, 1957, states:

> "The Board* which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment. Brown v. Board of Education, 347 US 483, 98 L Ed 873, 74 S Ct 686, 38 ALR 2d 1180. Accordingly, the judgment of the Supreme Court of Pennsylvania is reversed and the cause is remanded for further proceedings not inconsistent with this opinion."

On June 28, 1957, the Supreme Court of Pennsylvania entered the following order:

> "The decrees of the Orphans' Court of Philadelphia County are vacated at the appellee's costs and the cause remanded for further proceedings not inconsistent with the opinion of the Supreme Court of the United States as set forth in its mandate."

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*Referring to the Board of Directors of City Trusts of the City of Philadelphia.

Opinion and Order of Philadelphia Orphans' Court (9/11/57)

It is a universally accepted rule of law that the disqualification or incompetency of a trustee shall not be permitted to defeat the purposes of a charitable trust, nor to impeach its validity, nor to derogate from its enforcement—the trustee must be fitted to the trust and not the trust to the trustee. We know of no decision of any court in the English-speaking world which challenges this rule of law. As a matter of fact, the Supreme Court of the United States, on two previous occasions in litigation dealing with the estate of the present testator, clearly indicated its adherence to this principle.

When this will was before the United States Supreme Court for the first time in *Vidal et al. v. Stephen Girard's Executors,* 43 U. S. (2 Howard) 127, 188, that court said:

> "It is true that, if the trust be repugnant to, or inconsistent with the proper purposes for which the corporation [here the City of Philadelphia] was created, that may furnish a ground why it may not be compellable to execute it. But that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust."

Again, in *Girard v. Philadelphia,* 74 U. S. (7 Wallace) 1, 12, the court stated:

> "Now, if this were true [that the city could not act as trustee] the only consequence would be, not that the charities or trust should fail, but that the chancellor should substitute another trustee."

Opinion and Order of Philadelphia Orphans' Court (9/11/57)

In the course of the present proceedings, the Supreme Court of Pennsylvania, in a scholarly, well-reasoned opinion, carefully and fully reviewed the law and concluded (386 Pa. 548, 566):

> "But finally, even if the Board of Directors of City Trusts *were* deemed to be engaged in 'State action' in the administration of the Girard trust, petitioners would nevertheless not be entitled to the remedy they seek. If the city, because bound in its public or governmental actions by the inhibition imposed upon it by the Fourteenth Amendment, cannot carry out a provision of Girard's will in regard to the beneficiaries of the charity as prescribed by him, the law is clear that the remedy is, not to change that provision, which, as an individual, he had a perfect right to prescribe, but for the Orphans' Court, which has final jurisdiction over the trust which he created, to appoint another trustee."

The Supreme Court of the United States has ruled, as a matter of federal constitutional law, that the Board of Directors of City Trusts of the City of Philiadelphia is an agency of the State of Pennsylvania and consequently forbidden by the Fourteenth Amendment from operating, even as a trustee of private funds, an establishment which excludes all but "poor white male orphans." This is the sole issue decided by that court. It did not rule, either directly or indirectly, that the testator's express wishes were to be disregarded and that the two Negro applicants were to be admitted to Girard College.

Stephen Girard, himself, and both appellate courts have defined the primary object of the trust to be the creation of

an institution for "poor male white orphan children." The Supreme Court of Pennsylvania, which is the final arbiter of our state law, has unequivocally stated that if, for any reason, the Board of Directors of City Trusts of the City of Philadelphia cannot continue to administer the trust in accordance with testator's directions, it becomes the duty of this court to remove it as trustee and to appoint a substituted trustee which can lawfully administer the trust in the manner prescribed by the testator.

Our course has been clearly charted. The highest appellate courts of the nation and of this state have set forth the principles of federal law and state law, respectively, which we must follow in finally disposing of the petitions which are the basis of this litigation.

In order to harmonize the opinions of the United States Supreme Court and the Supreme Court of Pennsylvania, we hold: (1) that the primary purpose of the testator to benefit "poor white male orphans," only, must prevail; and (2) that the disqualification of the Board as trustee of this estate by the United States Supreme Court requires us to remove it from the administration of the trust and to appoint a substituted trustee, not so disqualified.

Accordingly, we reaffirm our previous ruling that William Ashe Foust and Robert Felder are not eligible for admission to Girard College because they are not "poor white male orphans."

We, therefore, enter the following

DECREE

AND NOW, this 11th day of September, 1957, in obedience to the mandate of the United States Supreme Court dated June 11, 1957, and the order of the Supreme Court

of Pennsylvania filed June 28, 1957, and in conformity with the opinion of the Supreme Court of Pennsylvania, dated November 12, 1956, it is hereby ordered and decreed that:

1. The petitions of William Ashe Foust and Robert Felder for admission to Girard College are dismissed.

2. The Board of Directors of City Trusts of the City of Philadelphia is removed as trustee of the estate of Stephen Girard, deceased, effective upon the appointment of a substituted trustee by this court.

3. The Board of Directors of City Trusts of the City of Philadelphia is directed to transfer and deliver the records and assets of the estate of Stephen Girard, deceased, to the substituted trustee, promptly, after such substituted trustee has been appointed and duly qualified.

4. The Board of Directors of City Trusts of the City of Philadelphia is directed to file an account of its administration of the estate of Stephen Girard, deceased, within six months after the date of this decree.

Opinion and Order of Supreme Court of Pennsylvania (1/24/58)

PENNSYLVANIA SUPREME COURT

GIRARD COLLEGE TRUSTEESHIP.

(391 Pa. 434, 138 A. 2d. 844)

OPINION BY MR. CHIEF JUSTICE JONES, January 24, 1958:

When this matter was here before, we affirmed the action of the Orphans' Court of Philadelphia County denying admission to Girard College to William Ashe Foust and Robert Felder, poor male Negro orphans, for the reason that the will of Stephen Girard, the founder and endower of the College, expressly restricts admission to "poor male white orphans": see *Girard Will Case,* 386 Pa. 548, 551, 127 A. 2d 287. Although the institution is referred to as a College, the testator himself aptly termed it an "Orphan Establishment" in one of two codicils which, with the decedent's will, were probated shortly after his death in 1831.

The will nominated and appointed as trustee of the charity the Mayor, Aldermen and Citizens of Philadelphia, the then corporate title of the City, which duly entered upon its trust duties. But, for years, the College has been administered by the Board of Directors of City Trusts of Philadelphia, a body statutorily created by the Act of June 30, 1869, P. L. 1276. The Act empowered the Board to accept and execute charitable trusts bequeathed to the City of Philadelphia, as trustee, whereof a large number, following Girard's lead, had come into existence: see *Philadelphia v. Fox,* 64 Pa. 169, 172 et seq. For the proper administration of the trusts committed to it, the Board of

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City Trusts is accountable to the Orphans' Court of Philadelphia County: *Wilson v. Board of Directors of City Trusts,* 324 Pa. 545, 188 A. 588. That court, deeming the Board of City Trusts to be like any other trustee which is a creature of statute and authorized to accept and administer private trusts, held by its decrees, which we affirmed, that the Board of City Trusts was bound to abide faithfully by the restrictions which Girard's will imposes on admissions to the College.

However, the Supreme Court of the United States reversed our judgment of affirmance and remanded the cause for further proceedings not inconsistent with that Court's opinion which held that the Board of City Trusts is an agency of the State of Pennsylvania and that, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the College because they were Negroes was discrimination by the State which is forbidden by the Fourteenth Amendment, citing *Brown v. Board of Education,* 347 U. S. 483: see *Pennsylvania v. Board of Trusts,* 353 U. S. 230.

In obedience to the Supreme Court's mandate, we vacated the decrees of the Orphans' Court and remanded the cause to that court "for further proceedings not inconsistent with the opinion of the Supreme Court of the United States as set forth in its said mandate," a true and correct copy thereof being appended to our order of remand.

The Orphans' Court, construing the Supreme Court's opinion to mean no more than that the Board of City Trusts was constitutionally incapable of administering Girard College in accordance with the testamentary requirements of its founder, entered decrees removing the Board as trustee of

Girard College and substituting for that purpose thirteen private citizens none of whom holds any public office or otherwise exercises any governmental power under the Commonwealth of Pennsylvania or any of its political or municipal subdivisions. It is these decrees which are now before us for review on the separate appeals of Foust, Felder, the Commonwealth of Pennsylvania and the City of Philadelphia (the State and City having voluntarily become parties to the proceedings). Simply stated, the question for decision is whether the action of the Orphans' Court is inconsistent with the opinion of the Supreme Court of the United States.

It is the appellants' contention that the Supreme Court's mandate required the Orphans' Court to order the Board of City Trusts to admit Foust and Felder to Girard College forthwith. With that, we cannot agree. Had the Supreme Court so intended, it would have said so just as it did in *Sweatt* v. *Painter*, 339 U. S. 629 (1950), where there was involved a state-supported University's denial of admission to a Negro because of his race. The order of reversal in the *Sweatt* case also included a remand of the cause for further proceedings not inconsistent with the Supreme Court's opinion but, immediately preceding, and as a part of the order of reversal, there is the specific ruling by the Court that "the Fourteenth Amendment requires that petitioner be admitted to the University of Texas Law School." The mandate in the instant case contains no such directive.

The appellants' effort to make a "segregation" issue out of Stephen Girard's private charity, merely because of the inability of the Board of City Trusts, as trustee, to comply with the donor's express directions, serves only to confuse and obscure the real issue involved as to the right of a pri-

vate individual to bequeath his property for a lawful charitable use and have his testamentary disposition judicially respected and enforced. In *Holdship* v. *Patterson*, 7 Watts 547, 551 (1838), Mr. Chief Justice GIBSON pertinently stated that a testamentary benefactor "has an individual right of property in the execution of the trust, and to deprive him of it would be a fraud on his generosity. To appropriate a gift to a purpose *or person* not intended, would be an evasion of the donor's private dominion" (Emphasis supplied). As lately as *Borsch Estate*, 362 Pa. 581, 586, 67 A.2d 119 (1949), we recognized, as constitutionally safeguarded, the right of a benefactor to have enforced the limitations and restrictions affixed to his testamentary gift. The exercise of that right is but one of the manifestations of the right of private property which is fundamental to our social, economic and political order and whose preservation unimpaired is as vital to our Negro citizens as it is to their white breathen.

As we read the Supreme Court's opinion, what it holds, and all that it was presumably intended to hold, in view of what was then before the Court, is that the Board of City Trusts, being a State agency, is incapable of administering Girard College in strict compliance with the founder's prescribed racial restriction on admissions without being guilty of a violation of the Fourteenth Amendment. However, the supreme Court did not say that there is any Constitutional or other legal barrier to the removal of the Board of City Trusts as trustee of Girard College in order that the Orphanage can be administered in accordance with all of the testator's express directions including the qualifications for admission to the student body. On

the other hand, there is high authority for such procedure where a trustee is either unable or fails or refuses to administer a trust in accordance with the lawful directions of the settlor.

In *Vidal et al.* v. *Girard's Executors,* 43 U. S. (2 Howard) 126, 188 (1844), which was concerned with an attempt by Stephen Girard's heirs to nullify the Girard Trust, one of the grounds of attack was that the City of Philadelphia, a municipal corporation, was legally incapable of executing the trust. In rejecting this contention Mr. Justice Story, speaking for the Supreme Court, said: "It is true that, if the trust be repugnant to, or inconsistent with the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it. But that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust."

Subsequent to the "Consolidation Act" of February 2, 1854, P. L. 21, which enlarged the physical area of the City of Philadelphia by incorporating therein outlying territory, Girard's heirs renewed their attack on the trust. The case again went to the Supreme Court of the United States where it was argued that the "Consolidation Act" had "either dissolved or destroyed the identity of the original corporation [City of Philadelphia], and it is consequently unable any longer to administer the trust." Mr. Justice Grier, who delivered the opinion of the Court, said, "Now, if this were true [that the City could no longer act as trustee of the Girard Estate], the only consequence would be, not that the charities or trust should fail, but

that the chancellor should substitute another trustee": *Girard* v. *Philadelphia,* 74 U. S. (7 Wall.) 1, 12, 13 (1868).

The inability of the Board of City Trusts to apply constitutionally the racial criterion prescribed by the testator for admissions to Girard College affects *the trustee* and *not the trust.* As the opinion for the Orphans' Court so well states, "It is a universally accepted rule of law that the disqualification or incompetency of a trustee shall not be permitted to defeat the purposes of a charitable trust, nor to impeach its validity, nor to derogate from its enforcement—the trustee must be fitted to the trust and not the trust to the trustee." It necessarily followed, therefore, that the course to be pursued in order that the trust may continue to be fully effectuated in accordance with the benefactor's intent was not to obliterate by judicial fiat an express term of his will which, as a private individual, he had a legal right to impose (see *City of Philadelphia* v. *Girard's Heirs,* 45 Pa. 9, 26) but for the court, which has jurisdiction of the trust and its fiduciary, to appoint substitute trustees capable of carrying out the testator's lawful prescriptions. And, that is precisely what the Orphans' Court has done.

The appellants argue, however, that "As a result of legislative implementation and City management, Girard College has taken on a public character" and must, therefore, be administered as a public charity by a public body subject to the inhibitions of the Fourteenth Amendment. We are unable to perceive the slightest basis for the contention either in Girard's will or in legislation passed in relation to the Girard Estate.

The testator's primary and dominant object was to found a private charitable institution for the training, education

and maintenance of poor male white orphans. Thus, his will expressly declares: " . . . I am *particularly desirous* to provide for such a number of *poor male white orphan children,* as can be trained in one institution, a better education as well as a more comfortable maintenance than they usually receive from the application of *public* funds . . ." He directed that certain physical things be done on the land he devised for the College "so that the establishment [i.e., the College] may be rendered secure and *private.*" And, upon devoting, secondarily, specified income from the trust fund to the promotion of the prosperity of the City and the health and comfort of its inhabitants, the testator directed that such income should be applied yearly for the indicated purposes but only "after providing for the College as hereinbefore directed, as my *primary object*" (all emphasis above supplied).

It is not possible to read Girard's will without being deeply impressed with the fact that it was *the College, as a private charity,* and *not the trusteeship of the City,* that was the primary object of the donor's testamentary scheme. Of course, a trustee was a necessary and unavoidable incident of the trust, and the testator, desiring the continuity of the institution, availed himself of the services of the only existing local corporate body capable of administering the trust in perpetuity. What the will so clearly reveals as to the intended paramountcy of the private charity has long since been judicially recognized. In *Girard* v. *Philadelphia,* supra, the Supreme Court of the United States spoke of the College, just as the testator had done, as the "primary object" of the three objects to which the income of the whole residuary estate was to be devoted. Cf. also *Vidal et al.* v.

Girard's Executors, supra. And, in *City of Philadelphia* v. *Girard's Heirs,* supra, this Court, in construing the Girard will, declared that its dispositive portion was "a devise of all the residue of his real and personal estate to the city of Philadelphia, an existing corporation, in trust, as his 'primary object', to construct, furnish, constitute, and maintain the institution now known as the Girard College . . ."

The private character of the trust and the privacy of the Orphanage which the trust was established to maintain and administer were aptly described in *Girard Will Case,* supra, as follows: "All provisions of the will show that it was not intended to be a public school; indeed, it is not merely a school at all but what Girard himself called in a codicil to his will, an 'Orphan Establishment,' a home where the fatherless boys eat, sleep, study and live together, enjoying the testator's bounty which provides for them not only an education but also lodging, board, clothing and all the necessities of life. . . . Girard College is a comparatively large institution, but no different legal principles apply to it for that reason than to the smallest of private schools. It is erected on land owned by Girard and the buildings were constructed with his own funds. . . . The college has been supported and maintained for now over a century by Girard's estate; not a penny of State or city money has ever gone into it; no taxpayer has ever been called upon to contribute to it; true, it is exempt from local taxation, but so are all other charities even though restricted as to their beneficiaries and managed by private trustees."

The statutes and ordinances which the appellants urge as having made a public trust of Girard College did not so operate. Certain it is that no additional legislation was

required to clothe the City with the fiduciary powers necessary for the administration of Girard College. The Supreme Court said in this very connection in *Vidal et al.* v. *Girard's Executors,* supra: "We think, then, that the charter of the city does invest the corporation with powers and rights to take property upon trust for charitable purposes, which are not otherwise obnoxious to legal animadversion; and, therefore, the objection that it is incompetent to take or administer a trust is unfounded in principle or authority, under the law of Pennsylvania." The legislative enactments which the appellants stress were designed in large part to enable the Commonwealth and the City to receive and use for their governmental purposes pecuniary legacies bequeathed directly to them by Girard's will. The rest of the legislative enactments were purely administrative measures neither envisioned nor required by Girard's will. And, the same can be said for the ordinances which the appellants cite.

What Mr. Chief Justice LOWRIE so clearly recognized for this court in *Philadelphia* v. *Girard's Heirs,* supra, is peculiarly apposite here: "In all gifts for charitable uses the law makes a very clear distinction between those parts of the writing conveying them, which declares the gift and its purposes, and those which direct the mode of its administration. And this distinction is quite inevitable, for it is founded in the nature of things. We must observe this distinction in studying Mr. Girard's will, otherwise we run the risk of inverting the natural order of things by subordinating principles to form, the purpose to its means, the actual and executed gift for a known purpose to the prescribed or vaticinated modes of administering it, that

are intended for adaptation to an unknown future, and of thus making the chief purpose of the gift dependent on the very often unwise directions prescribed for its future security and efficiency."

Little less than startling is the suggestion that the State or City could, by legislation enacted by either of them after Girard's death, alter or affect the terms of his will respecting the creation and administration of Girard College which did not call for or require legislation to make it an operating charitable institution. There is nothing in the testator's will or in any legislation by the Commonwealth or the City that serves to make Girard College a public charity or that requires that it be publicly administered. On the contrary, we hold, on the basis of the compelling testamentary evidence, already noted, that Girard College is a private charity capable of being lawfully administered by private trustees.

In removing the Board of City Trusts as trustee of Girard College and in substituting the private individuals as trustees for that purpose, the Orphans' Court acted well within its jurisdiction and powers. It has had jurisdiction over testamentary trusts at least since the Act of March 29, 1832, P. L. 190, § 4: see *Wilson* v. *Board of Directors of City Trusts,* 324 Pa. 545, 548, 188 A. 588, where it was said that "Whatever may have been the uncertainty as to the jurisdiction of the orphans' court prior to 1832, the Act of March 29, 1832, P. L. 190, Section 4, and the decisions which followed it, cleared away. It provided that the jurisdiction of the several orphans' courts shall extend to and embrace trustees who are accountable in any way for the property of a decedent." It has also had jurisdiction over trusts for the benefit of orphans since the Act of March 27, 1713, 3 Pa. Stat. at Large 14, Chap. 197.

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The Fiduciaries' Act of April 18, 1949, P. L. 512, § 331(5), which is the presently applicable statute, confers exclusive power on the Orphans' Court to remove a trustee "when, for any other reason, the interests of the estate are likely to be jeopardized by his continuance in office." Over and above such statutory power, it has long been established that the Orphans' Court possesses the power of a court of chancery in aid of an exercise of its jurisdiction: see *Stevens's Estate,* 200 Pa. 318, 322, 49 A. 985. What was said there in the opinion of the court below, whereon this court affirmed *per curiam,* is presently so pertinent as to justify the following quotation: "The courts of Pennsylvania have looked with favor upon charities, and the law of the state, as administered from the beginning of this province, has always been broad enough to discern the objects of every charity and to preserve and enforce it, notwithstanding any defect, such as want of power in the trustees or otherwise: The Apprentices' Fund Case, 13 Pa. C. C. Rep. 241. Therefore, when a charity is established in any manner, such a slight impediment as a defect or want of power in the trustee to execute it does not stand in the way; the charity remains; the trustee is declared incapable of acting, and a competent trustee is appointed in his place. Chancery here steps in to enforce it and commits it to some one who may lawfully administer it: Frazier v. St. Luke's Church, 147 Pa. 256."

The contention which the appellants advance that the Act of 1869, supra, which created the Board of Directors of City Trusts, divested the Orphans' Court of any power to remove the Board of City Trusts as trustee is utterly lacking in merit. As this court recognized in *Philadelphia* v. *Fox,* 64 Pa. 169, 183 (1870), all that the Act of 1869

did was to make a change in the internal organization of the municipality by providing that one class of its functions (i.e., as fiduciary for private charities) should be administered in a manner different from what it had been theretofore. In *Wilson* v. *Board of Directors of City Trusts*, supra, where the Orphans' Court was held to possess plenary powers over trusts administered by the Board of City Trusts, it was pointed out that "The Act [of 1869] in no way ousted [the Orphans' Court's] jurisdictional control, and the fact that [the Act] required reports to be made to the City Council and others did not divest the orphans' court of the normal control that it had hitherto exercised over all trust estates created by will. Its power has been recognized since the passage of that Act."

No useful purpose would be served by discussing at greater length the jurisdiction of the Orphans' Court over testamentary trusts and their fiduciaries or the power of that court to remove a trustee who is incapable or fails or refuses to carry out a trust as its creator directed. Such a situation calls for the removal of the incapable trustee and the substitution of a fiduciary able to administer the trust as its provisions require; and the jurisdiction and power of the Orphans' Court to that end is not open to question. Here, there is a conclusively adjudicated want of capacity in the Board of City Trusts to administer Girard College in accordance with the intention and directions of the testator's will. There was, therefore, nothing other for the Orphans' Court to do in the circumstances but to remove the inhibited trustee and appoint trustees capable of administering the College as Stephen Girard intended and prescribed.

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The appellants assert that the action of the Orphans' Court in removing the Board of City Trusts and in substituting therefor trustees capable of administering Girard College in accordance with the settlor's directions constituted State action which denied to the minor applicants the equal protection of the laws guaranteed them by the Fourteenth Amendment. As support for this contention, they cite *Shelley* v. *Kraemer,* 334 U. S. 1, and *Barrows* v. *Jackson,* 346 U. S. 249. The pertinently distinguishing feature of those cases is that in each of them it was a *constitutionally guaranteed right* of an individual that was subjected to the inhibited discrimination based on race or color. No such right is involved here, as we believe will clearly appear.

Concededly, it has long been authoritatively established that an official act of a member of a State's judiciary constitutes State action within the contemplation of the Fourteenth Amendment. No one will gainsay that. See *Ex Parte Virginia,* 100 U. S. 339; also, *Shelley* v. *Kraemer* and *Barrows* v. *Jackson,* supra. The fallacy in the appellants' argument lies in the fact that the complained-of discrimination in the instant case does not impinge upon any *civil right* to which the minor petitioners have a constitutional claim along with all other members of the community. Not coming within the qualifications required by Stephen Girard's will for admission to his Orphanage, the present applicants have no right to be beneficiaries thereof in defiance of the settlor's plainly expressed and legally valid testamentary provisions. Neither *Shelley* v. *Kraemer* nor *Barrows* v. *Jackson,* supra, teaches otherwise.

On the contrary, in *Shelley* v. *Kraemer,* where a party to a racially restrictive agreement relative to private prop-

erty sought equitable enforcement of the covenant against Negro purchasers of portions of the restricted property, the Supreme Court took occasion to observe, first of all, that "among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property" and then declared that "Equality in the enjoyment of property rights . . . [is] an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee." The undisputed facts in the *Shelley* case made it clear that, but for the active intervention of the State court, the Negro purchasers would have been free to occupy the properties in question without restraint. Thus, the State had made available to the covenantees the full coercive power of government to deny to the Negro purchasers, on the ground of race or color, their constitutional right to own and enjoy property which they were willing and financially able to acquire and which the grantors were willing to sell. As contrasted by the Supreme Court, "The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to the petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing." In the instant case, no one not possessing the qualifications prescribed by Girard's will for admission to the Orphanage can claim any right that entitles him to share Stephen Girard's largesse on an equal, or any, footing with those whom Girard himself expressly made the beneficiaries of his bounty.

Barrows v. *Jackson* was also a suit by a covenantee of a racially restrictive agreement, brought to recover from a

breaching covenantor the contractually stipulated damages due for selling restricted property to a Negro. The only parties to the suit were the signatories to the restrictive agreement. No attempt was made to enjoin the Negro purchaser from enjoying the property which he had so acquired. The State court, on the rationale of the *Shelley* case, denied the plaintiff a recovery. The Supreme Court, in affirming the judgment of the State court, reasoned as follows: "To compel respondent to respond in damages would be for the State to punish her for her failure to perform her covenant to continue to discriminate against non-Caucasians in the use of her property. . . . If the State may thus punish respondent for her failure to carry out her covenant, she is coerced to continue to use her property in a discriminatory manner, which in essence is the purpose of the covenant."

Thus in *Barrows,* just as in the *Shelley* case, although in a different form of action, it was the supplicated judicial enforcement of a claim arising out of a racially restrictive covenant in impairment of a Negro's constitutionality guaranteed civil right that was deemed to be discrimination by State action which the Fourteenth Amendment inhibits. This seems plain enough, for immediately after referring to the effects of the restrictive covenant on the owner's exercise of her property rights, the Supreme Court at once said, —"The next question to emerge is whether the state action in allowing damages deprives anyone of rights protected by the Constitution". Thereupon, the Court concluded that the State action did so operate, saying,—"If a state court awards damages for breach of a restrictive covenant, a prospective seller of restricted land will either refuse to sell to non-Caucasians or else will require non-Caucasians to pay a higher price to meet the damages which the seller may in-

cur. Solely because of their race, non-Caucasians will be unable to purchase, own, and enjoy property on the same terms as Caucasians. Denial of this right by state action deprives such non-Caucasians, unidentified but identifiable, of equal protection of the laws in violation of the Fourteenth Amendment. See *Shelley,* supra."

Nowhere in *Shelley* v. *Kraemer* or in *Barrows* v. *Jackson* did the Supreme Court denounce as void the restrictive covenants respectively involved in those cases. Such covenants are recognized as valid *inter partes* so long as they are adhered to voluntarily. Notwithstanding the discriminatory nature of a covenant restricted on the basis of race or color, no one can compel the covenantor to sell his property in violation of his restrictive agreement or otherwise force him to desist from abiding by his covenant. To do so would be to invade *his* constitutionally guaranteed right of dominion over his own property. And, that would be no less true of Stephen Girard's trust were we to hold that, because of his testamentary limitation on admissions to Girard College to "poor male white orphans", he has been guilty of an unconstitutional discrimination by virtue of the Fourteenth Amendment, wherefor all *poor male* orphans, regardless of color, are eligible for admission to that institution.

The elements which brought the "equal protection" clause of the Fourteenth Amendment into play in *Shelley* v. *Kramer* and *Barrows* v. *Jackson* consisted of State action for the enforcement of a discrimination based on race or color in impairment of a constitutionally protected right of an individual to which he, along with all other members of the community, is entitled as a matter of public law. It is

plain enough from the words of the Fourteenth Amendment that it is "laws", and not claims under some private testament, whereof the Amendment guarantees everyone "equal protection". Manifestly, therefore, an element essential to the invocation of the "equal protection" clause of the Fourteenth Amendment is absent in this case.

We are not unmindful that, when the Supreme Court reversed our former action in this case and remanded the record for further proceedings not inconsistent with its opinion, there was likewise present only the action of the State agency as trustee of Girard College and the racial discrimination on admissions imposed by Girard's will which the trustee was enforcing. In short, then as now, there was no violation of a constitutionally protected right possessed alike by everyone. We have already indicated our belief that had the Supreme Court intended that the court below, having jurisdiction and supervisory control over the trustee of Girard College, should admit the Negro applicants forthwith, it would have plainly said so just as it did in *Sweatt* v. *Painter,* supra. This deduction is, of course, a negative approach to the intended scope of the Supreme Court's ruling. Our positive interpretation of it is that *a State agency,* even when acting as the trustee of a private charity, can have *no part* in the enforcement of a racially discriminatory restriction regardless of what type of rights it affects. It need hardly be remarked that, had our study of the Supreme Court's opinion led us to the conclusion that no trustee, other than the Board of City Trusts, can lawfully administer Girard College, we would have been alert to carry out the ruling to the full extent of its implications.

Furthermore, if all that is necessary to constitute a denial of equal protection of the laws in violation of the Four-

teenth Amendment is State action and a racial or religious discrimination, then no private charity created by will can any longer dispense its benefits on the basis of race, creed or color according as its settlor has stipulated. A will is without any force or effect whatsoever until it is probated. This is so elementary as not to require citation of authority; and, equally fundamental it is that the admission of a will to probate constitutes judicial action whether it be by the register, the surrogate or some other officer thereunto authorized by law. It is plain enough, therefore, that State action is necessary to effectuate a will which creates a private charity whose benefits are dispensed on the basis of race, creed or color. What keeps such a charity, so created and restricted, from constituting a violation of the "equal protection" clause of the Fourteenth Amendment is that no one who does not come within the settlor's definition of beneficiary has a constitutionally protected right (or any right for that matter) to share in the charity's benefits.

Further dissimilarity between the *Shelley* and *Barrows* cases on the one hand and the instant case on the other is in the fact that in the former cases the full power of the State by way of court enforcement of the racially restrictive covenants was sought and relief refused, while in the present instance all that has happened is that, in the course of the proceeding instituted by the two Negro boys for admission to Girard College, the Orphans' Court, having been authoritatively advised that the Board of City Trusts is incapable of administering Girard College as its founder directed, removed the incapable trustee and appointed other fiduciaries who can administer the College in the manner Stephen Girard prescribed. In so doing the Orphans'

Court did no more than it would do in any case upon ascertaining that a trustee was no longer capable of discharging his fiduciary duties competently and adequately.

The appellants argue, however, that, because the substituted trustees will continue to restrict admissions to Girard College to poor male orphans of a particular race, whom Girard by his will specified as alone eligible for admission, the action of the Orphans' Court will deny the present applicants of a different race the equal protection of the laws guaranteed them by the Fourteenth Amendment. In aid of this argument, the appellants unwarrantedly charge that the Orphans' Court's exercise of its judicial power in the premises was "for the sole purpose of excluding Negroes from Girard College" and that the action "was taken solely in order to enable the school to remain segregated." The Orphans' Court did not act to *exclude* Negroes from Girard College. None had ever been admitted. What the Orphans' Court did was to refuse to admit the Negro applicants because they did not qualify for admission under the terms of Girard's will. And, to speak of Girard College as remaining "segregated" as a result of the Orphans' Court action is to use a term whose present-day stigmatizing connotation has no proper place in this case.

The appellant City persists in its complaint that it was denied procedural due process by the Orphans' Court's entry of its decrees, after the remand, without further hearing before that court. Brief reference to the procedural steps pursued in this litigation will at once disclose that all parties have been fully heard. Hearings on the petitions of Foust and Felder were held for days before the Orphans' Court where testimony was taken *in extenso* and the matter thoroughly argued by counsel. Exceptions

to the hearing judge's decrees were filed and thereafter argued by counsel for appellants before the court sitting *en banc*. Following entry of the final decrees, the matter was appealed to this court and then carried to the Supreme Court of the United States. When the cause was lately remanded to the Orphans' Court pursuant to the Supreme Court's mandate, there was no occasion for any further hearing in the matter. The record was complete. It was the duty of the Orphans' Court, just as it is our duty now, to proceed in a manner not inconsistent with the opinion of the Supreme Court. And, that, we think we are doing.

The decrees are affirmed at the cost of the Commonwealth of Pennsylvania and the City of Philadelphia.

United States Supreme Court's Dismissal of Appeal and Denial of Certiorari (6/30/58)

UNITED STATES SUPREME COURT
PENNSYLVANIA ET AL. v. BOARD OF DIRECTORS OF CITY TRUSTS OF PHILADELPHIA ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

No. 947. Decided June 30, 1958.
(357 U. S. 570)

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

Pennsylvania Act of November 19, 1959, P. L. 1526, 20 Purdon's Pa. Stat. Ann. §§ 1144.1-1144.9

No. 538

AN ACT

Relating to property held for minors by political subdivisions; prescribing procedures for the substitution of fiduciaries; granting powers and imposing duties on the Orphans' Court; and authorizing such substituted fiduciaries to establish and maintain common trust funds for the investment and reinvestment of the moneys of the estates of minors of which they may be guardians; providing for the administration of funds so established; and prescribing the nature and kinds of investments which may be made therein.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Whenever property is held by any political subdivision of this Commonwealth in a fiduciary capacity for a minor or minors and it shall appear, from petition filed in the Orphans' Court of the county wherein the political subdivision is situate, to be in the public interest that such fiduciary relationship be terminated and a substitute fiduciary or fiduciaries be appointed in its place and stead, the Orphans' Court shall have the power to direct the filing of an account or accounts and to order the discharge of said political subdivision as fiduciary.

Section 2. The Orphans' Court, by such orders and decrees as may be deemed necessary and after such notice as the court may direct, shall appoint a substitute fiduciary

or fiduciaries as guardian of the property and estate so distributed, and such appointee shall also act as a like guardian of the property and estate of other minors whose custody is thereafter committed to such fiduciary or fiduciaries by the natural mother, guardian or next of friend of such minors as evidenced by a written instrument giving and granting consent to such custody.

Section 3. The guardian, when so appointed, shall be the guardian of every such minor and shall be entitled, in like manner as other guardians, to demand and receive any effects or property from any person having possession thereof or owing the same, and to give receipts therefor. It shall be the duty of the guardian to take care of the same as guardian, and to make the same productive as far as reasonably can be, and to deliver and pay over the same with the increase, to the orphan on his attaining the age of twenty-one years, or to his legal representatives if he shall die before attaining that age.

Section 4. The court may make such orders and decrees as may be necessary to transfer any property interest, and such orders or decrees shall be authority to all transfer agents and others to transfer securities or other property interests held by the fiduciary.

Section 5. Any guardian so appointed and charged with the administration of such estates of such minors may establish and maintain one or more common trust funds for the collective investment and reinvestment of the moneys of any such estate; Provided, That the assets comprising such common trust fund consist solely of assets of the class

authorized by law as investments for funds held by fiduciaries.

Section 6. Such guardian shall invest the moneys of the estate of any such minor in such common trust fund by adding the same thereto and by apportioning a participation therein to such estate of any minor of which it may be guardian in the proportion that the moneys of the estate added thereto bears to the aggregate value of all the assets of such common trust fund at the time of such investment, including in such assets the moneys of the estate so added. The withdrawal of a participation from such common trust fund shall be on a basis of its proportionate interest in the aggregate value of all the assets of such common trust fund at the time of such withdrawal. The participating interest of any estate in such common trust fund may, from time to time, be withdrawn, in whole or in part, by the guardian. Upon such withdrawals, the guardian may make distribution in cash or ratably in kind, or partly in cash and partly in kind. Participations in such common trust fund shall not be sold to any other corporation or person.

Section 7. If a bond or other obligation for the payment of money is acquired as an investment for any such common trust fund at a cost in excess of the par or maturity value thereof, the guardian may, during but not beyond the period that such obligation is held as an investment in such fund, amortize such excess cost out of income on such obligation by deducting from each payment of income and adding to principal an amount equal to the sum obtained by dividing such excess cost by the number of periodic payments of income to accrue on such obligation from the date of such acquisition until its maturity date.

Pennsylvania Act of November 19, 1959, P. L. 1526
20 Purdon's Pa. Stat. Ann. §§ 1144.1-1144.9.

Section 8. The guardian shall designate clearly upon its records the names of the estate of a minor on behalf of which such guardian owns a participation in any such common trust fund and the extent of the interest of the minor's estate therein. No such estate shall be deemed to have individual ownership of any assets in such common trust fund but shall be deemed to have the proportionate undivided interest in the common trust fund. The ownership of the individual assets comprising any such common trust fund shall be solely in the guardian.

Section 9. No mistakes made in good faith and in the exercise of due care and prudence in connection with the administration of any such common trust fund shall be held to exceed any power granted to, or violate any duty imposed upon, the guardian if promptly after the discovery of the mistake the guardian takes whatever action that may be practicable under the circumstances to remedy the mistake.

Section 10. The following act and parts of act and their amendments are repealed to the extent hereinafter specified:

(1) The act of February 27, 1847 (P. L. 178), entitled "An act relative to the Girard college for orphans," absolutely.

(2) Section 6, act of April 20, 1853 (P. L. 623), entitled "An act to incorporate the Beneficial Saving Fund society of Philadelphia; relative to the Girard College for Orphans; and to a vacation of Turner's lane to Schuylkill Third Street, in Penn district, Philadelphia county," absolutely.

Pennsylvania Act of November 19, 1959, P. L. 1526
20 Purdon's Pa. Stat. Ann. §§ 1144.1-1144.9.

(3) Section 1, act of June 30, 1869 (P. L. 1276), entitled "A further supplement to an act, entitled 'An act to incorporate the city of Philadelphia,' approved the second of February, one thousand eight hundred and fifty-four, creating a board called directors of city trusts," in so far as it relates to the control and management of the persons of any orphans.

(4) All other acts and parts of acts in so far as they are inconsistent herewith.

Section 11. This act shall take effect immediately.

APPROVED—The 19th day of November, A. D. 1959.

DAVID L. LAWRENCE

Opinion and Order of
United States District Court (E. D. Pa.) (7/5/67)
(270 F. Supp. 782)

OPINION

July 5, 1967

JOSEPH S. LORD, III, J.

This action[1] arises out of a claim by seven Negro male orphans,[2] the City of Philadelphia, the Commonwealth of Pennsylvania, and the Attorney General of Pennsylvania that the continued exclusion of non-white applicants to Girard College by the defendant Trustees is constitutionally impermissible under the Equal Protection Clause of the Fourteenth Amendment. We earlier determined that this Court has jurisdiction. This ruling was in no way disturbed by the Court of Appeals.

We now hold that the plaintiffs have sustained their burden of proving unconstitutional State action and that, accordingly, the relief requested must be granted.

Plaintiffs' primary contention[3] centers on the appointment by the Orphans' Court in 1957 of substitute trustees to administer Girard College. The constitutional question

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[1]For earlier proceedings, see 260 F. Supp. 323; 260 F. Supp. 358, *vacated*, 373 F. 2d 771. Stephen Girard willed substantial property to the City of Philadelphia in trust to be used for erection and operation of a primary and secondary boarding school for poor, male, white orphans. The school is known as Girard College. The individual plaintiffs seek admission although they are not white.

[2]Under Pennsylvania law, an orphan need only be fatherless. Soohan v. City of Philadelphia, 33 Pa. 9 (1859).

[3]Plaintiffs' allegations with respect to the lease to the Philadelphia Community College of certain property owned by the Girard Estate are insubstantial. The proof is merely that the College benefits from the terms of the lease, which is the product of arms-length dealing between the Estate and the Community College. There is no evidence that a special advantage—intended or otherwise—was conferred on the College by the City of Philadelphia or its instrumentalities.

which is presented is both substantial and troublesome. The facts themselves are not in dispute. Stephen Girard appointed the City of Philadelphia to be trustee of the College established under the terms of his will. The trusteeship eventually passed to the Board of Directors of City Trusts, an agency of the City. In 1957, the United States Supreme Court held that this trusteeship constituted governmental discrimination barred by the Fourteenth Amendment. *Pennsylvania* v. *Board of Directors of City Trusts,* 353 U. S. 230 (1957). The Supreme Court did not, however, order the admission of the Negro plaintiffs in that case to the College. Instead, it remanded "for further proceedings not inconsistent with this opinion."

In supposed conformity to that mandate, the Orphans' Court of Philadelphia County removed the Board of Directors of City Trusts as trustee and appointed private persons, styled "Trustees of the Estate of Stephen Girard." The sole function of these substitute trustees was and is to administer Girard College, and they have continued in force the discriminatory policies prescribed by the will. The Supreme Court of Pennsylvania held that the Orphans' Court had acted properly, both in light of the U. S. Supreme Court's mandate and State law. Girard College Trusteeship, 391 Pa. 434 (1958), *appeal dismissed and cert. denied sub nom. Pennsylvania* v. *Board of Directors of City Trusts,* 357 U. S. 570 (1958). Since the only way the testator's will, as interpreted by the State courts, could be effectuated was by the appointment of non-public trustees, the Orphans' Court action was obviously the only remaining alternative to the admission of non-white applicants to the College.

Plaintiffs rely on the Supreme Court's recent decision in *Evans* v. *Newton,* 382 U. S. 296 (1966). That decision is controlling in this case, and we believe that its proper application requires that we sustain plaintiffs' claims for relief. In *Evans,* the testator devised land to the City of Macon, Georgia, to be used as a park for white persons only. The City eventually decided that it could not constitutionally deny access to Negroes and it permitted the multiracial use of the facilities, even though this was clearly proscribed by the restrictive terms of the will. Thereafter, individual members of the Board of Managers of the park brought suit in the State courts, demanding the appointment of substitute "private" trustees who could administer the will as it was written. The City next resigned as trustee, and the Georgia court accepted this resignation and appointed new trustees. The Supreme Court of Georgia affirmed this action, holding that State law required the appointment of new trustees so that the restrictive purpose of the trust would not fail.

The United States Supreme Court reversed, emphasizing that, "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action. The action of a city in serving as trustee of property under a private will serving a segregated cause is an obvious example. See *Pennsylvania* v. *Board of Trusts, supra.*" 382 U. S. at 299. Expanding on this notion of "governmental character," the Court cited as other examples a privately owned and managed town, *Marsh* v. *Alabama,* 326 U. S. 501 (1946), and the elective process, *Terry* v. *Adams,* 345 U. S. 461 (1953). It is apparent that discrimination in these instances is *per se* constitutionally prohibited.

Apparently excluded from this *"per se"* category of quasi-public facilities are schools, for the Court was at pains to point out that, "If a testator wanted to leave a school or center for the use of one race only *and in no way implicated the State in the supervision, control, or management of that facility,* we assume arguendo that no constitutional difficulty would be encountered." 382 U. S. at 300 (Emphasis added).

Of course, Stephen Girard, like the testator in *Evans,* did implicate the State in the administration of Girard College: the only questions are whether the College could have been and in fact was subsequently disassociated from the organs of State control, direction, and supervision, and whether, in consequence, the school was effectively cleansed of its "governmental character." Perhaps more to the point, the question is whether the State has purged itself of the discriminatory connection.

Plaintiffs, citing *Shelley* v. *Kraemer,* 334 U. S. 1 (1948), contend that the appointment of substitute trustees by the Orphans' Court was unconstitutional *per se.* We do not agree. In *Shelley,* the Supreme Court held that a State court could not enforce a racially exclusive restrictive covenant which would have impeded a sale of property by one consenting party to another consenting party. The Court did not hold, as would have been analogous to the case before us, that a prospective purchaser of property can force the owner to sell to him when the latter wishes to adhere to a restrictive covenant which purports to bar such sales. On the contrary, the Supreme Court stressed the fact that "the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners

by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated." 334 U. S. at 13. The distinguishing feature of the *Shelley* case was that the State courts had undertaken to enforce the restrictive terms of the agreements in a situation where "petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint." 334 U. S. at 19.

In the case before us, we find no consensual understanding among the parties; Stephen Girard did not provide for non-white male orphans and the trustees have refused to depart from the terms of the will.

All matters involving decedents' estates necessarily implicate the Orphans' Court, whose responsibility it is to effectuate the intent of the testator, to guard zealously against unwarrantable interferences with the testamentary property itself or the purposes to which the property has been pledged. Though a testator evidence the most blatant racial animus, the Orphans' Court, although admittedly an agency of the State, is duty bound to supervise his testamentary affairs as long as it does not directly associate or implicate itself in the discriminatory purpose.

The justification for this rule lies in the importance which our society attaches to a testator's will, to a man's

right to dispose of his property in a manner which conflicts with neither explicit federal nor state law at the time of the bequest or at the time of its subsequent administration. That justification is especially prominent where a charitable trust is involved. Pennsylvania has determined that the dominant intent of Stephen Girard was to benefit poor, male, white orphans. See Girard College Trusteeship, 391 Pa. 434 (1958). Such determination represents a matter of State law, completely within Pennsylvania's sphere, and one by which we are bound. *Erie Railroad* v. *Tompkins,* 304 U. S. 64 (1938). In substituting new individual trustees in place of the City agency, the Orphans' Court was merely performing its traditional supervisory and administrative function of assuring the effectuation of the testator's intent as previously determined by Pennsylvania courts.

Mere supervision of and, if necessary, appointment of trustees by a probate court does not alone amount to a proscribed State entanglement. This is not to say that the nexus between the Trustees and the Orphans' Court is totally without significance, as we shall later point out. It is only to say that the substitution does not, in and of itself and standing alone, involve constitutional implications.

We are buttressed in our conclusion by the Court's studious avoidance in *Evans* of any reference to *Shelley.* By its silence, the Court seems to indicate that the mere substitution of trustees without more is not constitutionally objectionable. Something more is required; something which transforms the purportedly private activity into a public function. In *Evans,* it was the nature of the part as "an integral part of the City of Macon's activities" which worked the essential alchemy. "From the pleadings we assume it

was swept, manicured, watered, patrolled, and maintained by the city as a public facility for whites only, as well as granted tax exemption * * *. The momentum it acquired as a public facility is certainly not dissipated ipso facto by the appointment of 'private' trustees." 382 U. S. at 301. In effect, the openness of the part, its "public" facade and function rendered it public as a matter of constitutional law, in the absence of record proof of a "change in municipal maintenance and concern over this facility." *Id.* As the Court concluded, "We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector." *Id.*

Evans represents a rather new departure from existing theories of State action; its own theoretical basis is, unfortunately, somewhat obscure. In essence, *Evans* holds that where actual State operation has transformed a public service-type enterprise into a governmental function, or where state control has confirmed the fact of such a subsisting function, the subsequent transfer of operating responsibility to private hands will not necessarily terminate the impetus of State involvement. This formula makes sense in the *Evans* case itself, which concerned a quasi-public park, open without restriction to all white members of the community and from all appearances no different from any other city park except in respect to the racial limitation.[4] But it is impossible to assess the applicability of *Evans* to this case

[4]Indeed, in view of the fact that the park was located in a Southern community, it may well have been that at one time all city parks were segregated, so that this park was exactly similar to every other park.

without first distilling some underlying principle from that opinion; mere factual comparison without philosophical foundation would be an exercise in futility.

We must start with the uncontrovertible proposition that private discrimination, however distasteful or invidious, is not prohibited by the constitutional strictures of equal protection. *Civil Rights Cases,* 109 U. S. 3 (1883). However, if the State or agencies of the State actively engage in or even sponsor racial discrimination, the provisions of the Fourteenth Amendment are called into play. *Reitman* v. *Mulkey,* U. S. , 35 U. S. L. W. 4473 (1967). The doctrine of State action must be subject to reasonable limitations. Quite obviously, the influence and beneficial activities of the State permeate virtually every area of human endeavor. There are few respects indeed in which the impact of governmental effort and energy is not felt. In a sense, almost everything we do is in part the product of or is facilitated by some State action.

Thus, it is not enough to say that "State action" is prohibited. As the Court in *Evans* acknowledged, "* * * generalizations do not decide concrete cases. 'Only by sifting facts and weighing circumstances' (Burton v. Wilmington Parking Authority, [365 U. S. 715 at 722 (1961)]) can we determine whether the reach of the Fourteenth Amendment extends to a particular case." 382 U. S. at 299-300. Yet obviously some principles of general application must be formulated. It is in the creative endeavor to make those principles work that courts are continually called upon to test the validity of the underlying theses—and, in turn, are themselves tested.

The Supreme Court "* * * has never attempted the 'impossible task' of formulating an infallible test for determin-

ing whether the State 'in any of its manifestations' has become significiantly involved in private discrimination." *Reitman* v. *Mulkey,* U. S. , 35 U. S. L. W. 4473 (1967). However, the cases "* * * do illustrate the range of situations in which discriminatory state action has been identified. They do exemplify the necessity for a court to assess the potential impact of official action in determining whether the State has significantly involved itself with invidious discriminations." *Id.* at .

The focus of our inquiry and, we believe, that of the Supreme Court, is *first,* the nature of the State involvement, and *second,* the nature of the institution concerned, be it park, school, or whatever. As we have already indicated, where the conscious *purpose* of the State action is to foster discrimination, the mere fact of such action requires constitutional sanctions. Thus, if the courts of Pennsylvania had acted to perpetuate discrimination at Girard College simply because it was their policy and purpose to foster racial segregation, without respect to the intent of the testator, we would have had little difficulty in disposing of this suit. But since that was not the case, we are required to make the two-fold inquiry implied by *Evans.*

The purpose of that inquiry is to ascertain whether the institution (here Girard College) is presently associated with the State in a manner which tends to suggest to the community that the institution's policy of racial discrimination is either practiced by or approved by public authority. This, we think, is the essence of *Evans* v. *Newton.* So, too, in *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 (1961), the governmental agency neither operated nor managed nor participated in the operation or man-

agement of the restaurant involved. Nevertheless, the Court held that the "State has so far insinuated itself" by the mere leasing of its property that discrimination was interdicted.

Far from abandoning the requirement of presently existing proscribed State action, those cases merely insist that we examine the whole course of conduct of the State with respect to the institution in question (including, of course, the appointment of substitute trustees) in order to determine whether the association has proved fatal to the discriminatory design and whether, in consequence, that design must now fail.

The quest is not for a scintilla of State action, for State action is ubiquitous and pervasive. The inquiry is properly directed to the type of State action involved, the extent to which the State thereby associates itself or is in the public view associated with invidious discriminatory purposes and policies, and, accordingly, the extent to which responsibility for the perpetuation of those invidious designs may be justifiably ascribed to the State itself.

The role of the court in evaluating these factors is a difficult one, but it is not unmanageable if the objectives remain clear. Whatever colorations the relevant factors may assume in the context of a particular case at a particular time, their significance may be properly focused by reference to the constitutional principles we have posited.

Much of the dissension within the Supreme Court itself as to the logical perimeters of the *Evans* decision can be explained by the absence of a full evidentiary record in that case. See the dissenting opinions of Mr. Justice Black and Mr. Justice Harlan. In effect, Mr. Justice Douglas, writ-

ing for the majority, found State action in the absence of record proof of disassociation from the public connections in the case of such an obviously public function as an open park, whereas Justices Black and Harlan stressed the necessity for affirmative record support of a continuing State involvement. In this litigation, we have the advantage of a full factual record to aid in our analysis of the relevant considerations to our decision.

We ask, *first,* what was and is the nature of the State involvement in Girard College? As in Evans, a city (later an agency of the city) was the named trustee of the institution. As such, it was responsible for the supervision, direction and control of the College. At that point, the State involvement was complete. Furthermore, it was an involvement of the most notorious nature; there are few citizens of Philadelphia who are not well-acquainted with the history of Girard College's steadfast intransigence to the demands of non-white applicants and the heavily publicized role which an agency of the City played in the denial of access to those applicants. *Cf. Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 (1961); *Reitman* v. *Mulkey,* U. S. (1967), *supra.*

Of course, the public trusteeship constituted nothing less than the active participation of the State in the very act of racial discrimination. Inevitably, the Supreme Court declared in the first Girard College Case that this conduct was State action prohibited by the Fourteenth Amendment.

After the removal of the Board of Directors of City Trusts and the appointment of substitute private trustees, the actual practice of discriminatory conduct by an acknowledged agency of the State ceased. However, the question

further posed by *Evans* is whether the "momentum", if any, of 128 years of direct State involvement continues to brand discrimination at Girard College with the imprimatur of State approval. We think that it does.

There is no doubt in our mind that the substitution of trustees accorded with the Orphans' Court's understanding of the testamentary intent of Stephen Girard and involved, as such, no element of invidious discrimination on the part of that judicial body. However, that same court has exhibited a significantly different association with and concern for the Girard Estate from that evinced for other trusts. Thus, the formal Orphans' Court proceeding, initiated by that Court itself, in which the newly appointed Trustees were sworn to uphold Girard's will, suggested that the Orphans' Court had a very special interest in the all-white institution which transcended mere testamentary supervision. Likewise, the two visits of the Judges of the Orphans' Court to Girard College in 1959 and 1961 and the presentation to the Trustees on the latter occasion of certificates bearing the name of the Court and the appreciation of its members implied approval of defendants' discriminatory conduct. In the same way, the fact that the trustees of this trust, as opposed to other charitable trusts, account to the Orphans' Court at regular intervals (as specified by the Court) and that the trustees may be removed and successors appointed at will by the Court affords the appearance of continuing interest in a trust which is, on its face, distinguishable from most other trusts only in its racial exclusivity.

We emphasize again that we do not in any manner mean to suggest that the Orphans' Court or any other State tri-

bunal has consciously and purposefully promoted or sponsored the discriminatory design at Girard College. However, we must conclude that the City trusteeship—itself unconstitutional—and the ensuing attempt to alter the nature of that trusteeship—itself not unconstitutional—have resulted in the institutionalization of Girard College as a governmentally sanctioned center of racial bias. We hold only that in this case, the transfer of immediate supervisory control to private trustees by the Orphans' Court failed to effectively disassociate the State from the discrimatory policies and purposes which the State operation of the school had come to embody.

Moreover, there is not insubstantial evidence of subsisting connections between Girard College and agencies of the Commonwealth which afford further grounds for inferring a proscribed involvement in the discriminatory design. Thus, today as from the inception of the school's operation, regular reports to the State Legislature by the College regarding its activities continue to associate the State with the institution's discriminatory conduct. Defendants urge that this fact is irrelevant because the annual reports are not required by the State, but only by the will of Stephen Girard. This argument is plainly without merit, for indeed, the City trusteeship was of the testator's making as well. The first Girard College Case demonstrated that it matters not at all what the source of the tie between the State and the facility is. It is significant only that the involvement exists and that it lends sustenance, actual or apparent, to a policy of racial discrimination.

Surely, the fact that the State Legislature receives reports regarding the conduct of an institution of whose discriminatory operation it must be aware cannot be passed

off as wholly irrelevant. If the testator required such reports, he must have contemplated at the very least potential supervision by the Legislature, not to mention the many benefits which might flow from this special relationship.

In addition, it must be noted that Girard College is subject to the general supervision of the State Department of Public Instruction, the State Department of Welfare, and other agencies concerned with the education and welfare of the young.[5] And it is undisputed that the College enjoys the substantial benefits of tax exemptions and other special concessions from public agencies. Of course, such controls and concessions constitute State action; the question is whether the State action is prohibited. We must conclude that, standing alone, the supervision which the State exercises over even private schools and the special benefits which it attaches to non-profit or charitable educational institutions do not involve prohibited State action *per se*.[6] But such factors are undeniably relevant in ascertaining whether the total State involvement is such as to afford to the practice of racial discrimination by a State-subsidized or supervised institution an aura of public approval and sanction. *Cf. Eaton* v. *Grubbs*, 329 F. 2d 710, 713 (C. A. 4, 1964).

In the context of this case, we must conclude that the advantages which Girard College derives from presently existing public services and supervision, when coupled with the presence of additional instances of State involvement, have implicated the State in the discriminatory design. It is the quality of Girard's environment which the State su-

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[5]We discussed this supervision in some detail in another connection in our second opinion. 260 F. Supp. 358.

[6]If the rule were otherwise, no privately endowed school could discriminate without constitutional consequences.

perintends: yet that environment excludes a substantial segment of the State's population. It is the school's dedication to enlightenment which the state rewards: yet that enlightenment is tarnished by the pervasive effects of racial discrimination. The State, by approving the College as a fit place for the education and upbringing of young boys and by crowning that approval with the legislative grace of tax exemption, has in some measure aided an invidious discriminatory policy; that much is clear. When combined with the history of direct State operation and the not wholly unambiguous manner in which that control was sought to be terminated, we think the conclusion ineluctable that the College has not purged itself of critical State involvement nor has the State erased the impression of public approval which long attached to the school's racial policies.

We turn, then, to the *second* inquiry: What is the nature of the institution, here Girard College, in terms of the services it performs in the community?

In *Evans,* the Court's ultimate holding was "buttressed by the nature of the service rendered the community by a park. The service rendered even by a private park of this character is municipal in nature. It is open to every white person, there being no selective element other than race." 382 U. S. at 301. Thus, partly as a result of the long period of State involvement and partly because of the inherent nature of the facility, the park was subject to the constitutional requirements of the Equal Protection Clause. However, the mere fact that the park performed a function which was also performed directly by muncipal authorities was clearly deemed insufficient, standing alone, to sustain a constitutional claim. "The range of governmental activities is broad and varied, and the fact that government has engaged in a

particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions." 382 U. S. at 300. The nature of the service is only one relevant factor to be considered.

Admittedly, the public character of the community services provided by the park in *Evans* was more obvious than those provided by Girard College. A park, open to the general public with the sole exception of non-whites, is the sort of facility which gives every appearance of State participation in or approval of the discriminatory design. There was nothing to distinguish this park from every other park in the community. Since other parks were operated by the municipality, the only reasonable inference was that this park too either was operated by the city or enjoyed the explicit approval of State agencies in its discriminatory operation. As such, it was "municipal in nature."

Here, the record establishes that Girard College was never a "public school" in the sense that it was ever administered by the Philadelphia Board of Education. However, unlike other "private" schools whose students can and do pay tuition, Girard undeniably performs a service to its students which would otherwise *have* to be performed by the public school system, since students at Girard are, by definition, unable to pay for education. In addition, there is substantial evidence of collaboration between the College and principals at various City public schools. Representatives of the College have maintained contacts with public school officials for the purpose of soliciting applications from students attending public schools who would be qualified to attend Girard College. Thus, it is a reasonable inference that public school authorities have referred potential

applicants to an institution which they must have known engaged in racial discrimination. The effect of this aspect of the College's recruitment program has been to associate the institution with the City's educational system in a manner which could only evidence mutual respect and esteem. Thus, it appears that the College relies in part on the resources of the City schools, and the public schools look upon the College as an obvious agency to which to refer "qualified" students, who, by definition, must be "white."

The park in *Evans* was open to the public in general, there being "no selective element other than race." In this case, the relevant sector of the public to be considered is school-age male orphans, since as defendants have many times reminded us, Girard College is as much an orphanage as it is a school, with some two-thirds of its budget allocated to the care, as opposed to training, of its wards. By their very nature, orphanages are restricted to poor children. As to the sex limitation, it is commonly accepted for reasons of administrability as well as tradition in such institutions. Furthermore, the record reveals that the Trustees have pursued a continuing policy of vigorous recruitment of applicants, without regard to their background, social status, intelligence, religion, or any other factor which might limit the broad (if not heavily populated) class of poor male orphans, other than the factor of race. While all applicants are tested extensively, the important fact is that no initial application is discouraged, except those from Negroes; quite the contrary, every effort is made to attract as many potential applicants as possible.[7]

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[7]This recruitment effort, which at one time even included public advertising, was the subject of proof early in the case. See 260 F. Supp. 358. Significantly, the intelligence of Girard College students is not exceptional, although the integrity and initiative of its graduates are unusual.

Thus, while Girard College is not a facility of general access to the public or even necessarily to the school-age population, it has always held itself out as an institution whose benefits are available to *any* needy, fatherless boy—as long as he is "white." In this sense, the College has become assimilated to a public boarding school or orphanage, "municipal in nature," the sole distinguishing feature of which at the present time is its racial restriction.

Surely, there is no question that State-sponsored racial inequality, as evidenced by State participation in or association with the discriminatory design, must be proscribed wherever it is found. On this, all of the parties to this litigation are wholly agreed. Sifting and weighing the factors of State involvement, we find it impossible to conceive that racial discrimination is constitutionally permissible at Girard College. The founder himself entwined the State in its administration, without even an articulated thought of some possible substitute. That entanglement persisted for over a century and a quarter. It was overtly removed by the unilateral action of a State agency, the Orphans' Court, which thereupon uniquely swore in the successors, binding them under State oath to carry out the founder's discriminatory policies,—and then officially thanked them for doing so. The State Legislature periodically receives reports, implicit in which is the perpetuation of discrimination. The Orphans' Court has demanded, uniquely as to this trust, periodic accountings and has, for all the record shows, accepted and approved them. Pennsylvania has overseen and approved both the education and upbringing of students at Girard College and the operation of the institution as a school and as an orphanage, serving an obviously public function. Recognizing the unavailability of an "infallible test," we

nevertheless find it logically and legally impossible to escape the conclusion that racial exclusion at Girard College is so afflicted with State action, in its widened concept, that it cannot constitutionally endure. Since the strictures of the Fourteenth Amendment apply to the administration of the institution, it may no longer deny admission to applicants simply because they are not "white."

The foregoing shall be considered our findings of fact and conclusions of law pursuant to F. R. Civ. P. 52(a). In addition, the findings of fact in our opinion and decree of November 2, 1966 are re-affirmed. To the extent that they are relevant, the following requests of the parties for findings of fact are *granted:*

Plaintiffs' Nos. 1 through 5; 7 through 11-60; 11-62 through 11-68; 13; 16 through 23; 27; 28; 29; 31; 32; 40; 42; 43.

Defendants' Nos. 1 through 4; 9; 11; 12; 14 through 21; 23 through 34; 40 through 44.

The following requests for findings of fact are *denied*:

Plaintiffs' Nos. 11-61; 12; 14; 15; 24; 25; 26; 30; 33 through 38; 41.

Defendants' Nos. 5 through 8; 10; 13; 22; 35 through 39.

To the extent that the parties' requests for conclusions of law are consistent with the foregoing opinion, they are *granted;* to the extent that they are inconsistent, they are *denied.*

There being "no just reason for delay," F. R. Civ. P. 54(b), we direct the entry of judgment for plaintiffs on Count One, in accordance with the appended decree.

It is so ORDERED.

Opinion and Order of
United States District Court (E. D. Pa.) (7/5/67)

DECREE

AND NOW, this 5th day of July, 1967, it is ORDERED AND DECREED that:

(1) This action shall be maintained as a class action under Federal Rule of Civil Procedure 23(b) (2). The class consists of all poor, male orphans who would be eligible for admission to Girard College except for the fact that they are not "white."

(2) Defendants are permanently enjoined from denying to members of the class [denominated in Paragraph (1) of this Decree] admission to Girard College on the sole ground that they are not white, provided that they are otherwise qualified for admission.

(3) The enforcement of this injunction is stayed pending application to and action by the Court of Appeals for such further stay as that Court deems proper, pending appeal.

BY THE COURT

JOSEPH S. LORD, III

J.

Opinions and Order of United States Court of Appeals for Third Circuit (3/7/68)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16721

COMMONWEALTH OF PENNSYLVANIA et al.,

v.

REVELLE W. BROWN et al.,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued November 28, 1967

Before STALEY, *Chief Judge*, and McLAUGHLIN, KALODNER, SEITZ and VAN DUSEN, *Circuit Judges*

OPINION OF THE COURT

(Filed March 7, 1968)

Opinions and Order of United States Court of Appeals for Third Circuit (3/7/68)

By McLAUGHLIN, *Circuit Judge.*

The problem here arises from the will of Stephen Girard, a Philadelphia, Pennsylvania resident who died in 1831. In his will, dated 1830, he laid down his fundamental theses that he had "been for a long time impressed with the importance of educating the poor, and of placing them by the early cultivation of their minds and the development of their moral principles, above the many temptations, to which, through poverty and ignorance they are exposed; * * *." Continuing, he said "* * * I am particularly desirous to provide for such a number of poor male white orphan children, as can be trained in one institution, a better education as well as a more comfortable maintenance than they usually receive from the application of public funds." He coupled this with his statement of heartfelt interest in the welfare of Philadelphia and his desire to improve it in its Delaware River neighborhood for the benefit of the health of its citizens and so that the eastern part of the city would correspond better with the interior. So inter alia he left the valuable residue and remainder of his real and personal property to "The Mayor, Aldermen and citizens of Philadelphia, their successors and assigns in trust to and for the several uses intents and purposes hereinafter mentioned and declared * * *." The will went into considerable particulars regarding the Girard Philadelphia and Kentucky property. Concerning a personal estate bequest of two million dollars for the College the will outlined at length where it would be located and in great detail the exact construction of the College and outbuildings, etc. The will also gave five hundred thousand dollars to Philadelphia for various public improvements. The Commonwealth of

Pennsylvania was bequeathed three hundred thousand dollars for internal improvement by canal navigation. This last bequest was conditioned upon the Commonwealth passing certain laws helpful to the testator's contemplated improvement of Philadelphia and for the desired objectives of Girard College. All the suggested assisting legislation was enacted by the Commonwealth in due course.

Mr. Girard stated specifically in his will:

> "In relation to the organization of the college and its appendages, I leave, necessarily, many details to the Mayor, Aldermen and citizens of Philadelphia and their successors; and I do so, with the more confidence, as, from the nature of my bequests and the benefit to result from them, I trust that my fellow citizens of Philadelphia, will observe and evince especial care and anxiety in selecting members of their City Councils, and other agents* * *."

He provided that the College accounts be kept separately so that they could be examined by a committee of the Pennsylvania legislature and that an account of same be rendered annually to said legislature together with a report of the state of the College. Philadelphia accepted the bequests and by ordinance set up a plan to administer the College by a Trusts Board. In 1833 a building committee of the City Council was appointed, a president of the College was chosen under an ordinance created for that purpose and the cornerstone of the main building laid. Construction was concluded in 1847 and the College opened the first of the following year. Down to 1869 the City Council operated the College directly, first by way of the trustees

until 1851 when the latter offices were abolished, and the Council again took over direct management. In 1869 the Commonwealth enacted a law which gave Philadelphia a local Board of Trusts to take over the control of Girard College. From that date the Board of City Trusts remained in charge of the College until 1958. Broadly summing up the Commonwealth and City's intimate association with Girard College the District Court, with full justification in the record, found as fact that:

> "Beginning in 1831 and continuing to date, the Commonwealth of Pennsylvania and the City of Philadelphia, by the enactment of statutes and ordinances, by the use and supervision of public officials, appointed by legislative and judicial bodies, by rendering services and providing tax exemptions, perpetual existence and exemption from tort liability, have given aid, assistance, direction and involvement to the construction, maintenance, operation and policies of Girard College."

It is important to note in this sequence that Philadelphia has made a consistently brilliant showing through the years in its management of the funds and real property from the Girard estate for the College. The money bequest amounted to six million dollars. This was increased to ninety million dollars plus by 1959. The various estate properties given the City for the College were not allocated any book value by the estate. These have insurable value at this time of $42,000,000.

In 1954 two applicants requested admission to the College. They were fully qualified but were refused because they were Negroes. They brought their cause to the United

States Supreme Court which held in that suit, titled Pennsylvania, et al. v. Board of Directors of the City of Philadelphia, 353 U. S. 230, 231 (1958):

> "The Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment. Brown v. Board of Education, 347 U.S. 483. Accordingly, the judgment of the Supreme Court of Pennsylvania is reversed and the cause is remanded for further proceedings not inconsistent with this opinion."

The Supreme Court of Pennsylvania on remand took none of the plainly indicated proceedings called for by the United States Supreme Court. It simply remanded the litigation to the Orphans' Court of Philadelphia County.[1] That court, without notice or opportunity for

[1]As rightly found by the District Court:

> "In 1959, after the decision of the United States Supreme Court in Pennsylvania v. Board of Directors, 353 U.S. 230 (1957), the Legislature of Pennsylvania enacted a statute granting the Orphans' Court the power and the duty to appoint substitute trustees for the property of minors, when a previous trustee which was a political subdivision is removed 'in the public interest,' and authorized a substitute trustee to invest such property of minors committed to their custody. The Act also contained other enabling legislation, without which the present defendants would be unable to carry out their duties. Act of November 19, 1959, P.L. 1526 (Exh. P-51 (10)). The Legislature Journal of the Senate of the Commonwealth of Pennsylvania shows that this statute was passed specifically as enabling legislation in aid of Girard College (Exh. P-51 (10))."

the plaintiffs to do anything and with no request from the City or other source whatsoever, on its own initiative ousted Philadelphia as trustee and installed in place of the City Board, persons of its own choosing. There is disagreement between the parties with respect to the method used for the selection of the new trustees. But it is conceded by appellants regarding prior notification by the Orphans' Court to its choices that, "Certainly no court would appoint an individual to a position of such responsibility without first affording him an opportunity to refuse." The record does show clearly that one of the court trustees testified that he was telephoned by one of the Orphans' Court judges prior to the appointments order being filed and told that the court had appointed its own trustees of which he was one. It is also in the record that the new trustees. as stated by one of them. were sworn in by at least one of the Orphans' Court judges and that included in their oath was "* * * that we would undertake to manage the will of Stephen Girard in accordance with the way it was written." The said trustee, referring to that part of the oath, further mentioned "That is what we all assumed anyhow." We think the foregoing factual narrative demonstrates that the Orphans' Court of Philadelphia County has been substantially involved with the supervision of the Girard Estate.

The Philadelphia City Trustees took no appeal from their ouster. The children plaintiffs did. The Pennsylvania Supreme Court found that the Orphans' Court action was not inconsistent with the mandate of the United States Supreme Court or the Fourteenth Amendment or the Girard will. Application for certiorari was denied by the United States Supreme Court, 357 U. S. 570 (1958).

The present litigation was instituted in the United States District Court for the Eastern District of Pennsylvania. The trial judge originally passed solely upon the question of whether Girard College was within the jurisdiction of the Pennsylvania Public Accommodations Act of June 11, 1935, P. L. 297, as amended by the Act of June 24, 1939, P. L. 872. The Court held it was within Sections (a) and (c) of the Act and not within the proviso of Section (d). This Court reversed that finding and returned the suit to the District Court for trial on the merits of Count 1 of the complaint which charges that "The refusal of the trustees of Girard College to admit applicants without regard to race violates the Constitution of the United States of America and applicable Federal statutes."

Appellants argue that they have not violated the equal protection clause of the Fourteenth Amendment by denying admission to individuals because of their color. In support of this they cite some Pennsylvania decisions including the State Supreme Court Girard College opinion on the remand of the United States Supreme Court to that State Court "for further proceedings not inconsistent with this opinion." What the State Court did was turn the matter over to its Orphans' Court which eliminated the City as trustee and installed its own group, sworn to uphold the literal language of the Girard will, a move effectively continuing the very segregation which had been condemned by the United States Supreme Court. True, the latter had denied the application for certiorari. Times without number that Court has plainly ruled that there is no inference permissible from its denial of application for certiorari, favorable or unfavorable to either side of a litigation. Certainly in the whole muddy situation flowing

from the State excision of the City Board, thereby taking away the linchpin of the Girard will, the then existing state litigation picture did not bring into the necessary sharp focus, the set piece maneuver which had completely circumvented the Supreme Court's directive. We, however, as above seen, do have all of that amazing effort to maintain Girard's discriminatory status before us in its true perspective.

Even in the above short resumé of the conception, creation and functioning of Girard College, the close, indispensable relationship between the College, the City of Philadelphia and the Commonwealth of Pennsylvania intended by Mr. Girard, meticulously set out in his will and faithfully followed for one hundred and twenty-seven years is self evident.[2] The ironic result of the removal of the City Trustees is that Pennsylvania's involvement with Girard College is far more powerful than was provided for by Mr. Girard. The Commonwealth's Orphans' Court, through its assumed power of appointment and reappointment of the Trustees, is significantly concerned with the current administration of the college.

On the whole vital Commonwealth and City relationship to Girard College shown we must agree with Judge Lord in the District Court, that the facts in Evans v. Newton, 382 U. S. 296, 301, 302 (1966) are fairly comparable to those in this appeal and that the decision of the Supreme Court therein governs the issue before us. In

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[2]So that there will be no possible cause for confusion, we note that the general topic of the sanctity of wills is not before us. Our total concern in this cause to which our decision is confined is a will in which the testator has deliberately and specially involved the State in the designated use of his testamentary property.

Evans a tract of land was willed to the Mayor and City Council of Macon, Georgia, as a park for white people, to be controlled by a white Board of Managers. The city desegregated the park and the managers thereafter sued the city and the trustees of the residuary beneficiaries, asking for the city's removal as trustee and the appointment of private trustees to enforce the racial limitations of the will. The Court accepted the city's resignation and appointed three new trustees. The State Supreme Court upheld the terms of the will and the appointment of the new trustees. The United States Supreme Court reversed. Mr. Justice Douglas for the Court in the opinion said as to the park in issue:

> "The momentum it acquired as a public facility is certainly not dissipated ipso facto by the appointment of 'private' trustees. So far as this record shows, there has been no change in municipal maintenance and concern over this facility. Whether these public characteristics will in time be dissipated is wholly conjectural. If the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment * * *.
>
> "Under the circumstances of this case, we cannot but conclude that the public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law. We may fairly assume that had the Georgia courts been of the view that even in private hands the park may not be operated for the public on a segregated basis,

> the resignation would not have been approved and private trustees appointed. We put the matter that way because on this record we cannot stay that the transfer of title per se disentangled the park from segregation under the municipal regime that long controlled it."

We think also that the Supreme Court's landmark decision in Shelley v. Kraemer, 334 U. S. 1, 20 (1948) surely points to the affirmance of the instant judgment in accordance with the justice which must be done in this case. The state courts in Shelley had enforced restrictive real estate agreements. The Court by Chief Justice Vinson held:

> "We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color.
>
> * * *
>
> "The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought

> to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color."

See also Barrows v. Jackson, 346 U. S. 249 (1953) and Sweet Briar Institute v. Button, 12 Race Rel. L. Rep. 85 (W. D. Va., 1967), rev'd per curiam, 387 U. S. 423, decision on the merits, Civil No. 66-C-10-L (W. D. Va., filed July 14, 1967). In Sweet Briar the trustees of the Institute sought to enjoin enforcement by the state attorney general of a racial restriction contained in the will establishing and funding the college. On motion of the defendant, the three judge Court abstained until such time as the college carried its prior case through the state courts. The Supreme Court reversed, stressing strongly, Section 202 of the Civil Rights Act of 1964, 42 U. S. C. § 200a-1 (1964), and ordered the District Court to determine the case on the merits. On remand, that Court entered a permanent injunction against enforcement of the racial restriction by the State of Virginia, holding that:

> "The State cannot require compliance with the testamentary restriction because that would constitute State action barred by the Fourteenth Amendment. This was the express holding in the Girard Case." F. Supp. (W. D. Va., 1967).

Girard's definitive position in this period of more than ever being operated by an agency of the state does not

simply emanate from the momentum of the Commonwealth and City legitimate participation in the establishment of Girard and its institutional life from its beginning to the present moment. It is in addition, as we hold, the obvious net consequence of the displacement of the City Board by the Commonwealth's agent and the filling of the Girard Trusteeships with persons selected by the Commonwealth and committed to upholding the letter of the will. Those radical changes pushed the College right back into its old and ugly unconstitutional position. Had the City Trustees been left undisturbed it is inconceivable that this bitter dispute before us would not have been long ago lawfully and justly terminated. It is inconceivable that those City Trustees would not have with goodwill opened the College to all qualified children. Given everything we know of Mr. Girard, it is inconceivable that in this changed world he would not be quietly happy that his cherished project had raised its sights with the times and joyfully recognized that all human beings are created equal.

We do not consider the move of the state court in disposing of the City Trustees and installing its own appointees to be a nonobvious involvement of the State as mentioned in the test outlined in Burton v. Wilmington Parking Authority, 365 U. S. 715, 722 (1961). The action in this instance and its motivation are to put it mildly, conspicuous. And what happened to Girard does "* * * significantly encourage and involve the State in private discriminations." Reitman v. Mulkey, 387 U. S. 369, 381 (1967). As the Court there said by Mr. Justice White, "We have been presented with no persuasive considerations indicating that this judgment should be overturned."

The judgment of the District Court will be affirmed.

KALODNER, *Circuit Judge,* concurring in the result.

I would affirm the Decree of the District Court on the ground that the removal in 1957 of the Board of Directors of City Trusts as trustee of the Stephen Girard Estate by the Orphans' Court, and its appointment of substituted individual trustees, for the avowed purpose of carrying out the racial exclusionary clause of Girard's Will, contravened the Fourteenth Amendment of the United States under the doctrine of Shelley v. Kraemer, 334 U. S. 1 (1948) and its progeny.[1]

The Fourteenth Amendment is contravened under the *Shelley* doctrine, where there is "active intervention of the state courts, supported by the full panoply of state power"[2] in the furtherance of enforcement of restrictions denying citizens their civil rights because of their race, color or creed.

In the instant case, the Orphans' Court had two alternative courses of action following the ruling of the Supreme Court of the United States in Pennsylvania v. Board of Directors of City Trusts, 353 U. S. 230 (1957), that the Board's denial of admission to Girard College of negro male orphans pursuant to the racial exclusionary clause of Stephen Girard's Will constituted state action in violation of the Fourteenth Amendment.

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[1]Barrows v. Jackson, 346 U. S. 249 (1953).

[2]Shelley v. Kraemer, 334 U. S. 1 at page 19. At page 14 of *Shelley* the Court said:

> "That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. . . . In *Ex Parte Virginia,* 100 U. S. 339, 347 (1880), the Court observed; 'A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way'."

The Orphans' Court could have pursued the alternative of directing the Board of Directors of City Trusts to admit negro orphans to Girard College. Instead, it *sua sponte* pursued the alternative course of removing the Board and appointing individual private trustees in its stead so as to permit continuance of the discriminatory admission policy dictated by Girard's Will.[3]

That the alternative action taken by the Orphans' Court was for the avowed purpose of giving effect to the racial exclusionary clause of Girard's Will is explicitly spelled out in the Orphans' Court opinion accompanying its Decree of September 11, 1957 which removed the Board of Directors of City Trusts as trustee of the Girard Estate, "effective upon the appointment of a substituted trustee by this court."[4]

In this Opinion, Girard's Estate, 7 Pa. Fiduc. Rep. 555, (1957), the Orphans' Court said at pages 557-558:

> "The Supreme Court of the United States has ruled, as a matter of federal constitutional law, that the Board of Directors of City Trusts of the City of Philadelphia is an agency of the State of Pennsylvania and consequently forbidden by the Fourteenth

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[3]The Orphans' Court in pursuing this alternative course acted in conformity with the holding of the Supreme Court of Pennsylvania, in Girard Will Case, 386 Pa. 548, 566 (1956) that should the Supreme Court of the United States hold, as it later did, that the Board of Directors of City Trusts could not carry out the exclusionary policy of Girard's Will, that the Orphans' Court could then appoint another trustee who could do so.

[4]The Orphans Court Decree of October 4, 1957, substituting thirteen private citizens as Trustees of the Stephen Girard Estate, is reported at 7 Pa. Fiduc. Rep. 606.

> Amendment from operating, even as a trustee of private funds, an establishment which excludes all but "poor white male orphans."
>
> * * *
>
> "The Supreme Court of Pennsylvania, which is the final arbiter of our state law, has unequivocally stated that if, for any reason, the Board of Directors of City Trusts of the City of Philadelphia cannot continue to administer the trust in accordance with testator's directions, *it becomes the duty of this court to remove it as trustee and to appoint a substituted trustee which can lawfully administer the trust in the manner prescribed by the testator.*
>
> * * *
>
> "In order to harmonize the opinions of the United States Supreme Court and the Supreme Court of Pennsylvania, we hold: (1) *that the primary purpose of the testator to benefit "poor white male orphans," only, must prevail; and* (2) *that the disqualification of the Board as trustee of this estate by the United States Supreme Court requires us to remove it from the adminstration of the trust and to appoint a substituted trustee, not so disqualified."* (emphasis supplied)

The Supreme Court of the United States has recently ruled that in examining the constitutionality of a state act the reviewing court (1) must consider the act "in terms of its 'immediate objective', its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment' ",[5] and, (2) must "assess the potential impact of

[5]Reitman v. Mulkey, 387 U.S. 369 (1967) at page 373.

official action in determining whether the State has significantly involved itself with invidious discriminations".[6]

The stated rule is, of course, applicable to the action of a state court.

Applying the principles above stated to the instant case, I am of the opinion that the Orphans' Court "significantly involved itself with invidious discriminations" when it removed the Board of Directors of City Trusts and appointed individual trustees of the Estate of Stephen Girard for the express purpose of effectuating the racial exclusionary clause in Girard's Will, and thereby brought itself within the ambit of the *Shelley* doctrine.

As the *Shelley* case said at page 18:

> ". . . it has never been suggested that state court action is immunized from the operation of those provisions [14th Amendment] simply because the action is that of the judicial branch of the state government."

For the reasons stated I would confine the scope of our affirmance of the District Court's Decree to the ground assigned at the outset of this concurring opinion.

VAN DUSEN, *Circuit Judge,* concurring:

I concur in the result reached by the majority opinion, but respectfully dissent from much of the language used.

Specifically, I disagree with the implication from the statements that the state courts in 1957 installed their own group of trustees "sworn to uphold the literal language of the Girard will" (and similar phrases). Such charac-

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[6]Id. at page 380.

terizations given to the actions of the Pennsylvania courts by the majority opinion seem to me unnecessary to the proper decision in this appeal. There is no necessary basis in this record to so criticize either the able Pennsylvania judges, who have so conscientiously handled the litigation arising from the Girard Trust, or the distinguished and dedicated trustees, who have contributed unselfishly so much to this important charitable enterprise, acting under the advice of their able counsel, for many years. This appeal is being decided on the basis of the present decisions of the United States Supreme Court in a field where the "federal role" is more "pervasive" and "intense" today than it was several years ago. *United States* v. *Price,* 383 U. S. 787, 806 (1966). Recent decisions of the Supreme Court, particularly in light of forceful dissents by Mr. Justice Harlan, make clear that the Fourteenth Amendment does not now permit the discriminatory operation of a charity like Girard College if the operation of that discrimination receives support from certain types of "state action."

Of the forms or types of "state action" in aid of discrimination that the Supreme Court has held render the discrimination unconstitutional, that in *Reitman* v. *Mulkey,* 387 U. S. 369 (1967), seems most clearly apposite to the facts of this case.

The decision of the United States Supreme Court in 1957 (353 U. S. 230) settled the question of whether the discrimination at Girard College was then unconstitutional state action. The same discrimination exists today and this appeal asks whether the unconstitutionality also remains because prohibited state action supports the discrimination. The answer is yes. When the Orphans' Court, on its own motion and without formal hearing, removed the

Board of Directors of City Trusts and appointed "private" trustees in their place, such affirmative state action constituted the "encouragement" of discrimination held to violate the Fourteenth Amendment in *Reitman* v. *Mulkey, supra,* at 376. The state did not make itself merely neutral. Just as the California court did in *Reitman* v. *Mulkey,* this court can examine the constitutionality of such state action "in terms of its 'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment,' " 387 U. S. at 373. *Cf. Burton* v. *Wilmington Pkg. Auth.,* 365 U. S. 715, 722 (1961). The record of the discrimination at Girard College after the 1957 United States Supreme Court decision makes it clear that the further "state actions" of the Pennsylvania courts did not "cure" the unconstitutionality, but perpetuated it by affirmatively encouraging continued discrimination. With hindsight it is clear that no reason exists for the deviation from Girard's will to appointing private trustees, except for its allowing compliance with the "white orphans" provision. And it is likewise an inescapable conclusion that the substitution of trustees in 1957 encouraged compliance with the "white" provision that has lasted for over 10 years. The state action that continues today in the Orphans' Court-trustee relationship is the "encouragement" of discrimination first given by the original appointment of the individual trustees.

Even clearer state action of "encouragement" is found in the statute passed by the Pennsylvania Legislature after the Supreme Court of Pennsylvania approved the substitution of private trustees. The Act of November 19, 1959, P.L. 1526, authorized *ex post facto* the Orphans' Courts' actions, and further implemented the change-over by fully empowering the new private trustees to serve in place of

the Board of City Trusts as guardians of the boys attending Girard College and to set up a common trust fund for their property. The same Act also repealed several prior laws passed to aid Girard College. Such affirmative legislative action, as an attempt to render a state neutral with respect to otherwise unconstitutional discrimination, makes *Reitman* v. *Mulkey* still more apposite.

When Stephen Girard deliberately and pointedly chose to involve the State in the "private" charitable conduct of his school (as was decided at 353 U. S. 230), he ran the risk that Philadelphia might not accept the trust, or might be unable to administer it, or might be subsequently unable to act because the federal constitution was changed (as occurred when the Fourteenth Amendment was passed). It is in this unique sitiuation of a testator's deliberate provision for a major role for the state in his charitable scheme, that the action of the state courts rises to the level of unconstitutional state action. The charitable scheme chosen by Girard might as easily have become invalid due to a change in the rule against perpetuities or some other limitation imposed by society on the unlimited rights of private property at death. See *Commonwealth of Pennsylvania* v. *Brown*, 260 *F. Supp.* 323, 357 (E. D. Pa. 1966).

JUDGMENT

This cause came on to be heard on the record from the United States Disrict Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed July 5, 1967, be, and the same is hereby affirmed, with costs.

March 7, 1968

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LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1967.

No. 1331.

REVELLE W. BROWN, JOHN A. DIEMAND, DR. GILSON COLBY ENGEL, FRED FOX, WALTER S. FRANKLIN, WALTER B. GIBBONS, ESQUIRE, HUBERT J. HORAN, JR., ESQUIRE, DR. LOUIS P. HOYER, FREDERICK H. LEVIS, DAVID F. MAXWELL, ESQUIRE, MRS. MINA F. OLIVER, ROLAND RODROCK RANDALL and HARRY G. SCHAD, Trustees of the Estate of Stephen Girard, *Petitioners,*

v.

COMMONWEALTH OF PENNSYLVANIA, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA and ALAN LEVI BOND, by his mother, MRS. RUBY BOND, CHARLES WILLIAM HICKS and THEODORE LEWIS HICKS, by their mother, MRS. MARIE HICKS, JAMES SCRUGGS and HENRY SCRUGGS, by their mother, MRS. ARDELLA SCRUGGS, TYRONE KARL WHITE and TERRY SHERWOOD WHITE, by their mother, MRS. CHARLOTTE L. WHITE, on behalf of themselves and all others similarly situated, *Respondents.*

MOTION OF GIRARD COLLEGE ALUMNI FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND ACCOMPANYING BRIEF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1331.

REVELLE W. BROWN, ET AL., TRUSTEES OF THE ESTATE OF STEPHEN GIRARD,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION OF GIRARD COLLEGE ALUMNI FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE.*

The Girard College Alumni respectfully moves for leave to file the attached brief *amicus curiae* in support of the Petitioners. Counsel for the Petitioners and counsel for the City of Philadelphia have consented to the filing of this brief, but counsel for the other Respondents have refused such consent.

Girard College Alumni is a corporation among whose purposes are to perpetuate and honor the memory of Stephen Girard and to be of service to Girard College.

The decision of the United States Court of Appeals of the Third Circuit is inconsistent with the provisions of the

Fourteenth Amendment and the decisions of this Court in that it

1. Treats the Fourteenth Amendment as if it were applicable to a purely private charity created by the will of a Philadelphia testator, the trust under which has for nearly ten years been administered by private trustees without assistance from the State, without compulsion by the State and without contribution from the State.

2. While purporting to enforce the Fourteenth Amendment the decision of the court below grants a preferred status to some, but not all, of those who were not named by Girard as beneficiaries of his will.

3. The special rights made available by the decision of the court below have not been "made available to all on equal terms," *Brown, et al., v. Board of Education,* 347 U. S. 483, 493 (1954), but the decision has granted preferred treatment to a certain portion of the general public, selected by the Court of Appeals, and has thus denied the beneficiaries of Girard's will the equal protection of the laws.

4. The opinion of the court below has modified the effective terms of Girard's will by adding to those named by him a few more beneficiaries whom he did not name, and to that extent has frustrated his purpose to dispose of his own property as he wished.

5. The decision of the court below denies to beneficiaries named in the will full opportunity to enjoy what is rightfully theirs under its terms.

Petitioners desire to file the attached brief in order to bring these matters to the attention of the court, since petitioners believe that their consideration is essential to a

full understanding of the question involved in this case and the matters referred to have not been raised in the brief filed by the Petitioners for the writ of certiorari.

WHEREFORE it is respectfully requested that this Motion for Leave to File a Brief *amicus curiae* be granted and the views expressed in that brief be considered by this Court in resolving the question presented by the Petitioners for the writ.

Respectfully submitted,

PHILIP PRICE,
Attorney for
Girard College Alumni.

DECHERT, PRICE & RHOADS,
Of Counsel.

April 24, 1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1331.

REVELLE W. BROWN, ET AL., TRUSTEES OF THE ESTATE OF STEPHEN GIRARD,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF GIRARD COLLEGE ALUMNI, *AMICUS CURIAE,* IN SUPPORT OF THE PETITION FOR CERTIORARI.

ARGUMENT.

It is the position of Girard College Alumni that the decision of the Circuit Court of Appeals is in conflict with the Fourteenth Amendment and with the decisions of this Court.

It was in *Pennsylvania v. Board of Directors of City Trusts of Philadelphia,* 357 U. S. 570 (1958), *rehearing denied,* 358 U. S. 858 (1958), that this Court dismissed an

appeal from, and denied a petition for certiorari to review, the decision of the Supreme Court of Pennsylvania, *Girard College Trusteeship,* 391 Pa. 434 (1958), which, in compliance with the teaching of this Court in this Estate, *Vidal v. Girard's Executors,* 43 U. S. (2 Howard) 127, 188 (1844); *Girard v. Philadelphia,* 74 U. S. (7 Wall.) 1, 12-13 (1868), had affirmed the decrees of the Orphans' Court of Philadelphia County, removing municipal trustees and appointing private, independent trustees that could give effect to the terms of the will and maintain Girard College as a school for "poor male white orphan children" (44a) [1]. In that case the Supreme Court of Pennsylvania said of the trust under Girard's will:

> "What keeps such a charity, so created and restricted, from constituting a violation of the 'equal protection' clause of the Fourteenth Amendment is that no one who does not come within the settlor's definition of beneficiary has a constitutionally protected right (or any right for that matter) to share in the charity's benefits." (p. 455).

The question is whether this private charity may continue to operate in accordance with the terms of the testator's will or whether the so-called discrimination [2] in the administration of Girard's bounty must be ended merely because for many years the trust had been lawfully managed by the Board of City Trusts of Philadelphia as a result of the compulsion that Girard was under, when he wrote his will, to select a perpetual trustee, *Girard Estate,* 4 D. & C. 2d 671, 714 (Pa. 1955) and *Girard Will Case,* 386

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1. Page numbers followed by "a" refer to pages of the Appellants' Appendix in the Circuit Court of Appeals.

2. Negroes have never been *excluded* from Girard College; they simply were not named, along with many others, as beneficiaries of the trust. The only persons excluded from Girard College are ministers (55a-56a). See *Vidal v. Girard's Executors,* 43 U. S. (2 Howard) 127, 197 (1844).

Pa. 548, 569 (1956), because the trust has been administered in conformity with the laws of Pennsylvania and because the courts of Pennsylvania have taken appropriate action to enable the terms of the will to be carried out. The court below has held that the Fourteenth Amendment forbids its continuance in accordance with its terms and that the income from Girard's estate must be made available to some, although not all, of the people who were not named as beneficiaries of it, even though the trust is purely private, is for a limited group of poor children, was created and is carried out on land and in buildings that are owned by the Girard Estate, without assistance from the State, without compulsion from the State and without contribution from the State toward the operation of the charity[3] beyond the charitable tax exemption enjoyed by all charities in Pennsylvania.

Such a conclusion not only is not required by the decisions of this Court but it is actually in conflict with them.

In *Brown v. Board of Education*, 347 U. S. 483 (1954), which this Court cited as authority for its decision in *Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia*, 353 U. S. 230 (1957), the opinion was directed exclusively to public education. The plaintiffs in that case had sought "admission to the public schools of their community on a nonsegregated basis," 347 U. S. at 487, and this Court held that where a state has undertaken to provide public education it has created "a right which must be made available to all on equal terms." 347 U. S. at 493. There is nothing in that case to suggest that a private school created by a private will and supported wholly by the private trust created by the testator should be made available not "to all on equal terms" but to a special, limited group, not named by the testator in his will but

3. Actually the State benefits from the operation of the charity through substantial tax payments that it makes (762a).

chosen by the court, whereby that select group would receive special treatment not available to any other members of the public on any terms.

In *Shelley v. Kraemer,* 334 U. S. 1 (1948) the courts below had enforced private restrictive covenants barring occupancy by Negroes of houses that they had bought from willing sellers. Thus the enforcement of the restrictive covenants interfered with the rights of the owners of property to sell it to willing buyers and with the rights of such buyers to acquire property from willing sellers. This Court held that although "restrictive agreements standing alone cannot be regarded as violative of any rights granted to petitioners by the Fourteenth Amendment," nor can "voluntary adherence to their terms," 334 U. S. at 13,[4] yet that the *enforcement* of the agreements by the state courts constituted prohibited state action. The Court noted "that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, hold and dispose of property." 334 U. S. at 10. The Court relied on *Buchanan v. Warley,* 245 U. S. 60 (1917), and *Harmon v. Tyler,* 273 U. S. 668 (1927), in which restrictions seeking to prevent persons, both white and colored, from occupying houses in certain areas solely on the basis of their color, had been enforced by the state courts. This Court held that "Participation of the State consists in the enforcement of the restrictions so defined," 334 U. S. at 13, and that the Fourteenth Amendment barred such action. Emphasizing the affirmative interposition of state power in order to prevent the free exercise of property rights by persons on equal terms, the Court said "These are not cases . . . in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as

4. Cf. also *U. S. v. Guest,* 383 U. S. 745, 755 (1966).

they see fit." There the states had enforced the covenants and thus "denied rights of property available to other members of the community" and the "full enjoyment of those rights on an equal footing." 334 U. S. at 19. The Court made clear that when the effect of state action "is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this court to enforce the constitutional commands," 334 U. S. at 20, but did not suggest that the Fourteenth Amendment required any court to change the terms of a will and expand it to include a few more people than the testator had named. Continuing, this Court said, "Because of the race or color of these petitioners they had been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color." 334 U. S. at 20-21. However, the court below has ignored this fundamental feature and accorded to its favored few rights in the Girard trust which have never been "enjoyed as a matter of course by other citizens of different race or color" or enjoyed "as a matter of course" by any citizens whatever except the very limited group specified by Girard in his will.

This Court also said that "a state law which denied equal enjoyment of property rights to a designated class of citizens of specified race and ancestry, was not a legitimate exercise of the state's police power but violated the guaranty of the equal protection of the laws". 334 U. S. at 21. This, however, is far from saying that the decree of a state court, which simply removed trustees who had become incapable as a matter of law, and because of a change in the law, of carrying out the intent of a testator, and substituted instead private persons who did not suffer from that disability and accordingly were able to accomplish the legitimate and lawful purposes of the testator, was itself a violation of "the guaranty of the equal protection of the laws." Indeed it was in fact no more than an effort by the state

court, which the court below would frustrate, to make effective Girard's attempt to dispose of his property to or for the benefit of persons of his own choice, which was one of the "civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment." 334 U. S. at 10.

The decree of the Orphans' Court did not *require* the new trustees to do anything in respect of admissions to Girard College. *Girard Estate,* 7 Fiduciary Reporter 606 (Pa. 1957). They were free to carry out the terms of the will and equally free to petition the court for leave to depart from any provision of the will that they deemed inimical to the purposes of the testator. Thus this case differs fundamentally from *Sweet Briar Institute v. Button,* 387 U. S. 423 (1967) and C. A. No. 66-C-10-L, W. D. Va. (July 14, 1967), (unreported) where the Attorney General of Virginia sought to *compel* the trustees of a school established for white girls to refuse admission to Negro students, even though the trustees desired to admit them.

In *Evans v. Newton,* 382 U. S. 296 (1966) this Court held that a public park, to which all members of the public except Negroes had been admitted and which for years had been "an integral part of the City of Macon's activities" and "was swept, manicured, watered, patrolled and maintained by the City as a public facility for whites only, as well as granted tax exemption, ..." acquired a momentum "as a public facility . . . which (was) . . . not dissipated *ipso facto* by the appointment of 'private' trustees." 382 U. S. at 301. The Court also pointed out that there "had been no change in municipal maintenance and concern over this facility" and held that the Court could not say "that the mere substitution of trustees instantly transferred this park from the public to the private sector." 382 U. S. at 301.

It is clear from this that the public park in Macon is far different from Girard College, a private school supported wholly by the funds received from Girard through the Girard Estate, which had been supervised by public trustees whose only public function was to see that the terms of the will were properly carried out, which was never "an integral part of the City" of Philadelphia's activities, which was never a public facility in any sense of the word but was limited by the terms of the will to a very small sector of all the children available for education. "The service rendered" by the private park in Macon was described as "municipal in nature" whereas the service rendered by Girard College is private in nature [5] since it has never purported to assume any municipal obligation other than teaching a very small group of white boys of specified age who suffer both from the infirmity of poverty and the lack of a father. It is thus not "open to every white person" and there is many a "selective element other than race." 382 U. S. at 301. Since it never had a "public character" it is not and never has been such "a public institution subject to the command of the Fourteenth Amendment" as was dealt with in that case. 382 U. S. at 302.

Girard College is now and always has been a purely private charity for a special limited class of beneficiaries, who may be drawn from points outside of Philadelphia or even of Pennsylvania, and there is nothing in the Fourteenth Amendment or in *Evans v. Newton* that requires any court to enlarge the class just a little bit but without making it truly public or having it serve all on equal terms.

The Court recognized the right to conduct a restricted, religious school which served a limited but far larger group

5. Unlike the Macon park no streets run through the Girard College grounds (614a, 615a, 616a).

than does Girard College, as was approved by this Court in *Pierce v. Society of Sisters,* 268 U. S. 510 (1925), but did not suggest that the "nondiscriminatory educational facilities," later described in *U. S. v. Price,* 383 U. S. 787, 806 (1966) as "fundamental rights" protected by the Fourteenth Amendment, must be supplied by any educational institution other than one which is truly public and affords an opportunity for learning "which must be made available to all on equal terms." *Brown v. Board of Education,* 347 U. S. 483, 493 (1954).

What the court below has decided does violence to the principles announced by this Court. While pretending that Girard College is a public school and adopting the fiction that it must serve "all on equal terms," it proceeds to select a chosen few to receive, not educational advantages made available to all on equal terms, but very special advantages, including free clothing, board and lodging, along with special training not available to any one else, pursuant to Girard's desire to afford the beneficiaries named in his will "a better education as well as a more comfortable maintenance than they usually receive from the application of the public funds" (44a). This Girard declared to be his "primary object" (62a).

Public education in Pennsylvania is not restricted to boys who are white, poor, without a father, between certain specified ages, and with first preference given to those who were born in Philadelphia, next to those born elsewhere in Pennsylvania, next to those born in New York City and lastly to those born in New Orleans (53a-54a). What the court below has done, under the pretence of giving effect to the Fourteenth Amendment, is not to recognize "a right which must be made available to all on equal terms," *Brown v. Board of Education,* 347 U. S. 483, 493 (1954), but instead it has created a preferred class, which was not

named by Girard in his will, but which the court below has selected to be treated as if it had been,[6] and which is to enjoy special advantages (257a, 258a, 302a, 318a, 398a, 401a-402a, 416a-418a, 432a, 632a, 633a), that will not be available to any girl or to any boy who is not poor, who has a father, who is outside the specified age limits (246a, 294a), and who cannot meet the standards for admission set by the trustees (299a, 319a, 411a-413a, 424a-425a, 449a, 479a).

This does not afford anyone the "equal protection of the laws" contemplated by the Fourteenth Amendment. It is in fact a perversion of the Fourteenth Amendment in order to serve a philosophical purpose and achieve a sociological result which presently seems desirable to the court below.

The children favored by the decision of the court below will receive their reward at the expense of those named by Girard himself to receive his bequest. Unlike a park, the capacity of Girard College, both physically and financially, is limited, and every one who has been selected by the court below to attend the College will displace one of those chosen by Girard himself. Who will compensate beneficiaries named in the will for being deprived of what is rightfully theirs? The decision of the court below is in effect a declaration that the Fourteenth Amendment has now ceased to provide "the equal protection of the laws" and has become instead a vehicle for sharing the wealth of others by persons currently being favored by the courts, in this case non-white male orphans alone out of all the people not named in the will, and that no charitable gift, which does not purport to benefit all mankind on a basis of equality, may be given effect if it is dependent for its administration

6. This was forecast in the Stay Order of the Court of Appeals, infra p. 15.

on the application by state courts of general state laws relating to wills and trusts. It is also at variance with the teaching of this Court in *Pierce v. Society of Sisters*, 268 U. S. 510, 534 (1924).

CONCLUSION.

It is accordingly urged that the petition for certiorari be granted and that the decision of the court below be reversed.

Respectfully submitted,

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APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 16,721.

(Caption Omitted)

Present: KALODNER and SEITZ, *Circuit Judges*, and COHEN, *District Judge*.

Upon consideration of the motion for stay of enforcement of Paragraph 2 of the Decree of the United States District Court for the Eastern District of Pennsylvania in Civil Action No. 39404, entered July 5, 1967, pending disposition of appellants' appeal from said Decree,

It is ORDERED that enforcement of Paragraph 2 of said Decree will be stayed until disposition of the instant appeal by this Court, or further Order of the Court;

It is FURTHER ORDERED that this Stay Order is conditioned upon the following stated conditions, and the undertaking of the appellants to comply therewith, such undertaking to be expressed in writing and filed with the Clerk of this Court on or before September 25, 1967:

(1) Any of the seven individual plaintiffs who reached the age of eleven years either prior to entry of the instant Stay Order or during its existence, will be considered for admission to Girard College without regard to the fact that they had become eleven years of age;

(2) Application by any members of the plaintiff class for admission to Girard College filed prior to the time the applicant reached the age of eleven years will not be denied by the appellant Trustee of Girard College on the ground that applicant had passed his eleventh birthday if and when the said Decree entered by the District Court for the Eastern District of Pennsylvania in Civil Action No. 39404 on July 5, 1967 ultimately becomes effective, and such applications of otherwise qualified orphans shall be given consideration by the said Trustees in accordance with the priorities established in Paragraph 6 of Section XXI of the Will of Stephen Girard;

AND IT IS FURTHER ORDERED that copies of the instant Stay Order be published once a week during its pendency, at the cost of the appellants, in the following listed publications:

Philadelphia Evening Bulletin
Philadelphia Daily News
Philadelphia Inquirer
Philadelphia Legal Intelligencer
Philadelphia Tribune

By THE COURT,

KALODNER,
Circuit Judge.

Dated: September 15, 1967

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IN THE

Supreme Court of the United States

October Term, 1967.

No. 1331.

REVELLE W. BROWN, et. al., TRUSTEES OF THE ESTATE OF STEPHEN GIRARD,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, et. al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

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COMMONWEALTH OF PENNSYLVANIA, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

COUNTERSTATEMENT OF QUESTION PRESENTED.

The District Court, after a full evidentiary hearing, found that beginning in 1831 and continuing to date the Commonwealth of Pennsylvania and the City of Philadelphia by the enactment of statutes and ordinances, by the special supervision of public officials (appointed by legislative and judicial bodies), by the rendering of services, and by the providing of tax exemption and perpetual existence, have given aid, assistance and direction to the construction, maintenance, operation and policies of Girard College, including its racial policies, and that the present

sui generis trustees of Girard College were appointed *sua sponte* by the Orphans' Court of Philadelphia solely in order to permit continued exclusion of Negroes. The record basis for these fact findings has not been contravened. Therefore the question presented is:

Did the Court of Appeals properly affirm the District Court's legal conclusion, based on these facts, that the trustees' continued refusal to admit qualified Negro children violated the equal protection clause of the Fourteenth Amendment?

COUNTERSTATEMENT OF THE CASE.

Petitioners' statement sets forth the procedural history of this litigation. Respondents do not agree with the gloss Petitioners have put on various procedural events and decisions, but it is not necessary to burden the Court with a restatement thereof. This Counterstatement of the Case therefore will be confined to the additional factual background necessary to an understanding of the legal question presented.[1]

Petitioners here denied admission to Girard College to qualified Negro boys solely on the basis of their race. The District Court, after three days of hearing the evidence, found as a fact:

> "Beginning in 1831 and continuing to date, the Commonwealth of Pennsylvania and the City of Philadelphia, by the enactment of statutes and ordinances, by the use and supervision of public officials, appointed by legislative and judicial bodies, by rendering services and providing tax exemptions, perpetual existence and exemption from tort liability, have given aid, assistance, direction and involvement to the construction, maintenance, operation and policies of Girard College" (808a, 869a, A52[2]).

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1. Respondents do not believe that the Petition conforms with this Court's Rule 23(1)(e) which calls for "a concise statement of the case *containing the facts material to the consideration of the questions presented.*" The Petition has wholly omitted the factual evidence which was the basis of the decisions of both courts below. This is a sufficient ground in and of itself for denying the writ. See Supreme Court Rule 23(4).

2. Page references proceeded by a large "A" are to the Appendix to the Petition for Writ of Certiorari. Those followed by a small "a" are to the separately bound two volume appendix. Those followed by a small "b" are to the short appendix attached to this brief (which contains relevant record documents omitted from the bound appendix).

Petitioners did not contend in the Court of Appeals and do not contend here, as they could not, that this finding is not supported by the evidence. The Court of Appeals held that there is "full justification in the record" for such factual finding (A57). In fact, as set out below, the evidence is overwhelming.

In 1831 Girard, reciting that he had "sincerely at heart the welfare of the City of Philadelphia," gave "the residue and remainder" of his estate[3] to "The Mayor, Aldermen and Citizens of Philadelphia their successors and assigns in trust" for various municipal and charitable purposes including the planning, construction and operation of Girard College by the City of Philadelphia (44a). Clearly, the gift to the City was made with an intention other than the acquisition of a perpetual trustee.[4] Clause XXI 9 of his Will states:

> "In relation to the organization of the college and its appendages, I leave, necessarily, *many details to the Mayor, Aldermen and citizens of Philadelphia and their successors;* and I do so, with the more confidence, as, from the nature of my bequests and the benefit to result from them, I trust that my fellow citizens of Philadelphia, will observe and evince especial care and anxiety in selecting members for their City Councils, and other agents . . ." (55a).[5]

Girard's contemporaries fully recognized that: "The whole value of the institution [Girard College] will depend en-

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3. Girard made some incidental private bequests and charged the City of Philadelphia with the duty of administering some of them. See, *e.g.*, Clause XVIII (40a).

4. Assuming there was no other institution then available to be a perpetual trustee, that fact in itself is a state-conferred benefit. However, Girard obviously could have appointed a group of private citizens with the right of the survivors to fill vacancies.

5. Italics in all quotations herein have been added.

tirely upon the administration of it," and that the College was to be a *public* charity run by public officials, and subject to constant public and legislative scrutiny[6] (809a, 869a, P-37, P-44). The following provision of the Will puts this fact beyond dispute:

> "Second, that separate accounts, distinct from the other accounts of the corporation, shall be kept by the said corporation, concerning the said devise, bequest, college and funds, and of the investment and application thereof; and that a separate account or accounts of the same shall be kept in bank, not blended with any other account, so that it may at all times appear on examination by a committee of the legislature as hereinafter mentioned, that my intentions had been fully complied with:—Third, that the said corporation render a detailed account annually in duplicate to the legislature of the Commonwealth of Pennsylvania, at the commencement of the session, one copy for the senate and the other for the house of representatives, concerning the said devised and bequeathed estate, and the investment and application of the same, and also a report in like manner of the state of the said College, and shall submit all their books papers and accounts touching the same, to a committee or committees of the legislature for examination, when the same shall be required: Fourth, the said corporation shall also cause to be published in the month of January, annually, in two or more newspapers printed in the city of Philadelphia, a concise but plain account of the state of the trusts, devises, and bequests herein declared and made,

6. In 1950 Girard's Solicitor, in a letter approved by the then-trustees, said: "Girard College is owned, administered, operated and maintained by the City of Philadelphia, acting through a municipal department, to wit, the Board of Directors of City Trusts" (D-7, 11b).

> comprehending the condition of the said college, the number of scholars, and other particulars needful to be publicly known, for the year next preceeding the said month of January, annually" (63a-64a).

Each year reports are submitted to the Legislature and published in the newspapers.

In 1832 the City passed a special resolution accepting the Girard gifts, including the provisions for the College, and later in the year passed an Ordinance creating a plan for selection by the City Councils of a Board to run Girard College as agents of the City Councils (809a, 869a).

The Estate of Stephen Girard turned over to the City by his executors amounted to only six million dollars (810a, 869a). The principal increased under the management of the City of Philadelphia, to an amount in excess of ninety million dollars by 1959, even with the College buildings and grounds and other real estate owned by Girard at his death carried on the books of the Estate at no value. The insurable value of the Estate's physical properties today is $63,000,000, including $42,000,000 applicable to the College (P-69, 10b). The private executors took their usual fees and commissions; the City, however, never received compensation for any of its services.

Before the College had actually been built by the City, excess income from the Estate was used by the City, as the Will directed, for general municipal purposes including payment for police.[7] To this day if there is an excess of income from trust properties over the needs of the College, such excess goes to the City. The present trustees themselves consider this provision, giving money to the City of Phila-

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7. Girard provided in Clause XXIV 3 that the City should be the remainderman under his Will with contingent remainders to the State and the Federal government "for the purposes of internal navigation" (63a).

delphia for other municipal purposes, highly significant to show public involvement. When they sought to induce the Federal government to grant the College a tax exemption, the application submitted stated:

> "It is interesting to note that in the event the Orphans' Court should determine at a future date that the needs of Girard College are amply protected by adequate income reserves, excess income will be distributed to the City of Philadelphia in accordance with Mr. Girard's directions." (734a)

Thus the City's decisions on timing in building and opening the College, its decisions as to the lavishness and completeness of the College, the size of the student body, the salary scale of the teachers and staff, as to how much should be spent for maintenance over the years and what reserves, if any, should be created, all had the effect of depriving the City of revenues to which it would otherwise have been entitled for other general municipal use.

In March, 1833, the City Councils appointed a building committee for the College consisting of members of Council. The Council also advertised for plans and offered prizes for the design of the College buildings. By another 1833 Ordinance the Council authorized appointment of a College president and appropriated six thousand dollars for his expenses on a trip to study similar institutions in Europe (71a, 73a, 810a-11a, 869a).

On July 4, 1833, the cornerstone of the main college building was laid at a ceremony presided over by the Mayor, Aldermen and Councilmen of the City (811a, 869a). At this ceremony a scroll containing the names of the City officials was deposited in the cornerstone where it remains to this day (*ibid.*). Following this ceremony the City planned, caused to be undertaken and supervised the physical con-

struction of all of the buildings as well as the wall at Girard College. Since the 43 acres left by Girard had been vacant farm land, every stone at Girard College was placed upon another stone by the City of Philadelphia (*ibid.*).

Every expenditure for the Girard Estate and for Girard College between 1832 and 1869 was specifically approved by a special ordinance of the City Councils (811a, 869a). In fact, the records of City Councils reveal that over the years some 320 special ordinances have been enacted providing for the operation, management, supervision and policy of Girard College (70a-102a). Among the various subjects covered by these numerous ordinances were ones permitting the admission of new students, determining the size of the student body and which buildings should be built, appropriating funds for litigation and reorganizing from time to time the specific body of directors responsible for administering the College. In addition the City Councils provided for a visiting committee of its own members to undertake supervision (812a-17a, 869a).

The City ultimately completed construction of the College buildings in 1847 and the College opened on January 1, 1848. The President of the Board of Directors of the College indicated at that time that the Board undertook its task with the Will of the founder as a guide, assisted by laws of the State and ordinances of the City Councils (813a, 869a). Indeed, throughout this period the City Councils exercised minute control over the affairs of the College, particularly in connection with the construction of the buildings. And after 1851, the City Councils abolished the trustees of the College and again placed supervision of all payments under the Councils themselves.

At the same time, the City improved Girard's real estate at 12th and Market Streets in Philadelphia, building such revenue-producing stores as Snellenburg's Department

Store, which for many years yielded income for use at the College (736a, 816a, 869a).[8]

After 1869, the Board of Directors of City Trusts operated the College. The members were "agents or officers of said City" (635a). They selected the president and the faculty, determined the curriculum and the size of the student body, decided whether buildings were to be built or torn down, and managed the investments (635a-638a).

State tax exemption now excuses the College from paying $401,184 per year (106a, 823a, 869a), and Federal tax exemption (in 1963) $2,640,000 per year (108a, 823a, 869a).

Beginning in 1848, and throughout its entire operation of the College, the City of Philadelphia itself excluded from Girard College applicants whom it deemed not to be white.

While the City of Philadelphia took the most direct and active part in building and operating the College, the Commonwealth also played an essential role. For example, it enacted certain enabling legislation contemplated by Girard's Will and made necessary because certain provisions of the Will called for actions of questionable legal validity or could not be achieved without specific legislation. *Girard Will Case,* 386 Pa. 548, 554, 127 A. 2d 287, 289-90 (1956).

These various Acts, collected in Exhibit P-51, include ones authorizing the City of Philadelphia to act under Girard's Will,[9] authorizing guardianship[10] and indenturing

8. When Snellenburg's recently (1963) unilaterally cancelled its lease with the Girard Estate, the Estate suffered an annual loss of some $360,000 on the Market Street property (817a). This was repaired only when the Philadelphia Community College, a governmental body, leased the "white elephant" department store building, turning the Estate's loss into an annual profit of $304,271 (1b-2b, 817a, 869a).

9. Act of March 24, 1832, P. L. 176, Act of April 4, 1832, P. L. 275.

10. Act of February 27, 1847, P. L. 178, Act of April 20, 1853 § 6, P. L. 623; Act of May 23, 1887, P. L. 168. When the City was removed as trustee, the Legislature accommodated the Estate so that the present Trustees could serve as guardian of the estates of Girard minors. Act of Nov. 19, 1959, P. L. 1526. See p. 14 *infra*.

of boys under the Will [11] and providing that the City should not place a road or street through the College grounds [12] (See 817a-19a, 869a).[13] The Legislature established a select committee of the House on the Estate of Stephen Girard and received annual reports from the trustees of the College. At various times these reports were printed as appendices to the Legislative Journals (819a, 869a).

In 1842 a special committee of the House of Representatives investigated the state of the College and issued extensive reports. In 1852, the Legislature directed the State Secretary to furnish a full set of the Colonial Records to the College which it retains.[14] When public outcry caused the Legislature to investigate the College's operation under City Council, the Legislature in 1869 enacted a statute establishing a special agency of the City, the Board of Directors of City Trusts, to administer the College [15] (820a, 869a).

As both school and orphanage the College serves a public function and has traditionally solicited its students from the white public at large, with State schools cooperating by recommending eligible white students (868a-69a).

The foregoing history touches only the highlights of the active participation of City and State in the creation and perpetuation of Girard College. A fuller presentation of this history is set forth in plaintiffs' Request for Findings of Fact in the District Court (807a-23a). These proposed findings were largely granted by the District Court (869a) and the Court of Appeals held that his findings had

11. Act of Feb. 27, 1847, P. L. 178.

12. Act of March 24, 1832 § 11, P. L. 182; Act of May 3, 1832 § 18, P. L. 428; Act of March 14, 1846 § 1, P. L. 125.

13. Thus the supposed "private" appearance of the College, stressed at p. 7 of the trustees' Petition, is the product of State action.

14. Act of April 2, 1852 § 4, P. L. 237.

15. Act of June 30, 1869, P. L. 1276.

"full justification in the record" (A57). Petitioners do not contest this. In sum these facts demonstrate the essential point of this case: that *but for* the activities of the State, Girard College would not exist. They also demonstrate that Girard intended his institution to have a public character, and the City and Commonwealth did everything to effectuate his intention. Indeed if the physical aspects of the College contributed *solely* by Girard could somehow be separated from those to which the State contributed, of the former there would remain only 43 acres of vacant land on Ridge Avenue, Philadelphia, intersected by numerous city streets, vacant land on the square at 12th and Market Streets, Philadelphia, and some $4,500,000 in cash. If the present trustees administered no more than such a trust res, they might arguably be administering a trust whose admission policies would not be controlled by the Fourteenth Amendment.[16]

Even under such a hypothesis, however, the trustees could not eliminate another crucial action by the State without which racial discrimination would not now exist at Girard College. This, of course, is the illegal failure of the State to admit eligible Negroes between the adoption of the Fourteenth Amendment and 1959. It cannot be disputed that *but for* this failure on the part of the City to conform to the legal requirements of the Fourteenth Amendment when application was made to them by two qualified Negroes in 1954, no racial restriction would exist today at Girard College. *Sweet Briar Institute v. Button,* 12 Race Rel. L. Rep. 1188 (1967).

16. It was no doubt such a situation which Mr. Justice Douglas hypothesized when he wrote in Evans v. Newton, 382 U. S. at 300: "If a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in the supervision, control or management of that facility, we assume *arguendo* that no constitutional difficulties would be encountered."

In recent years state involvement at Girard College has taken several further forms. First are the continuing supervisory functions which the City and State presently give the College. These are the contacts summarized by the District Court in its opinions (483a-87a, 862a-65a), including reports to the Legislature, tax exemption and supervision and inspection by the State Departments of Public Instruction and Welfare (483a-87a).[17]

Additionally, the State Courts have dealt with Girard College in a special way. When this Court determined in 1957 that there was a conflict between the City trusteeship and the Fourteenth Amendment, Girard was obviously not alive and present to indicate his personal choice between establishing a school for whites only or continuing the school under governmental trusteeship. Similarly, no other private person—heir, beneficiary or other—petitioned the Orphans' Court for a substitution of trustee pursuant to the normal rules of trust law.[18] Instead, the State Court itself *sua sponte* adopted the procedure of removing the City as trustee and of selecting, appointing and supervising other *sui generis* trustees. The Board of City Trusts did nothing to resist its ouster (638a). As Judge Kalodner correctly stated in his concurring opinion, this removal by the Orphans' Court was done solely "for the avowed purpose of carrying out the racial exclusionary clause of Girard's Will" (A66).

In the light of this background it is clear that the present trustees hold offices quite different from those of the ordinary private trustee, a person or institution specifically named in a will, or a substituted trustee approved by

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17. The District Court found as a fact that the College was subject to the supervision of the Commonwealth (483a-487a).

18. At least in *Evans v. Newton*, it was private petitioners who attempted to have the City removed as trustee.

a court pursuant to the petition of a private person who has a legal interest in the estate. The present trustees were selected and appointed solely by the Orphans' Court, just as the former trustee, the Board of City Trusts was selected and appointed by the Court of Common Pleas of Philadelphia. Six of the present trustees were members of the Board of City Trusts, a City agency, and one condition of their appointment here was that they had to resign from the Board of City Trusts (826a, 869a). The trustees' intentions were *ascertained before* the Orphans' Court entered its order removing the City and appointing them (825a, 869a). The present trustees were officially sworn in before the judges of the Orphans' Court (825a, 869a, 640a, 646a, 9b, P-54), and given a Court-impressed certificate of appointment, a seal of approval not given any other trustee (825a-26a, 869a, 647a). Contrary to the usual practice regarding trustees, from whom the Orphans' Court on its own motion never requires an accounting, in this case the Orphans' Court specifically directed the trustees to render accountings every year and, subsequently, every three years (826a, 869a). Likewise every three years each trustee must be reappointed, or a successor chosen for him by the Orphans' Court. The trustees were originally chosen and obviously their successors would be chosen, not only for their ability but according to the essential criterion that they would never decide to admit Negroes to Girard College (678a-79a). Certainly, a trustee who might privately wish to admit Negroes to the College (see *Sweet Briar Institute v. Button, supra*) would necessarily be influenced by the threat that the Orphans' Court would not reappoint him when his term expired. Finally, the special concern of the Orphans' Court for the College and the special treatment which it has given it, in contrast to that shown all other Pennsylvania trusts, is indicated by the visits of "official

inspection" paid to the College by the Judges of the Orphans' Court (644a, 645a, 862a, 3b, 4b) and the interest taken by the judges in the affairs of the College (648a-49a). For example, in April 1963, the Orphans' Court received a complaint about the President of the College (648a). The trustees were informed by Judge Bolger:

> "The Court ['at the conference of the Judges of the Orphans' Court'] has asked me to request that you give the matter contained therein the attention which you think it deserves and kindly let us have your comment" (649a, 5b).

An investigation was made by the trustees and reported to the Orphans' Court (650a, 6b).

Finally, when the substituted trustees found that certain existing State statutes interfered with their convenient administration of the trust, the legislature was induced to act (7b-8b). Act of November 19, 1959, P. L. 1526, Pa. Stat. Ann. tit. 20, §§ 1144.1-1144.9. As Judge Van Dusen, concurring below, noted: "The Act of November 19, 1959, . . . authorized *ex post facto* the Orphans' Court's actions and further implemented the changeover by fully empowering the new private trustees to serve in place of the Board of City Trusts as guardians of the boys attending Girard College and to set up a common trust fund for their property" (A71-A72).

On the basis of all these facts, the District Court held that Girard's admission policies were governed by the Fourteenth Amendment, and thus it could not exclude applicants, otherwise qualified, solely on the basis of race. The Court of Appeals for the Third Circuit, sitting *en banc*, unanimously affirmed.

REASONS FOR DENYING THE WRIT.

Petitioners have failed to advance any reason as to why the essentially factual decision of the District Court, unanimously affirmed by the Court of Appeals for the Third Circuit sitting *en banc,* merits a time-consuming review by this Court.[19] Six Federal judges who have heard this matter have held that denial of admission of Negroes to Girard College violates the Fourteenth Amendment. None has held to the contrary.

I. Petitioners Have Presented No Cognizable Ground Under This Court's Rule 19(1)(b) for Granting Certiorari.

The decision of the court below obviously was not in conflict with that of another court of appeals nor did it decide a federal question in conflict with applicable decisions of this Court.[20] Supreme Court Rule 19(1)(b). Therefore, Petitioners can only be contending that this case presents an important question of federal law which has not been, but should be, settled by this Court. Even a cursory consideration of the record in this case will show that no such question is present.

The ruling of the District Court here under review was based upon extensive fact finding as to the massive state in-

19. The Petitioners' misleading quotation from the District Court's first decision on a Motion to Dismiss the Complaint, in which the Court mentioned the "frontiers of the Fourteenth Amendment," merits little comment. The District Court's early decision on the Motion to Dismiss the Complaint did not in fact go to the merits of the federal issues, referred only to "some" of the constitutional issues involved, and was made in 1966 before this Court's decisions in *Reitman v. Mulkey,* 387 U. S. 369 or *Sweet Briar Institute v. Button,* 387 U. S. 423, and before the several lower court decisions applying the Fourteenth Amendment to identical facts. See cases cited page 16 below.

20. No decision of this Court since at least 1940 has barred the admission of Negroes to previously segregated premises.

volvement with Girard College, even apart from the role of the City as title holder, both before and after the substitution of trustees in 1959. The Petitioners did not challenge the sufficiency of the record to support this fact finding and the Court of Appeals held that the trial court had made its findings "with full justification in the record" (A57). This Court has traditionally refused to grant certiorari simply to review findings of fact confirmed by two lower Federal Courts.

If the factual finding of state involvement stands, then this case is governed *a fortiori* by this Court's ruling in *Pennsylvania v. Board of Directors,* 353 U. S. 230, that the existence of a testator's intent does not insulate an institution from the effect of the Fourteenth Amendment. *Evans v. Newton,* 382 U. S. 296; *Sweet Briar Institute v. Button,* 12 Race Rel. L. Rep. 388 (1967); *Estate of Clayton,* No. 5702, Denver, Colo., Probate Court (March 16, 1967) (not reported: Negroes admitted to school established under will modeled after Girard's); *Winsey v. Tate,* Dec. Term, No. 946, C. P. Phila. (March 17, 1967) (not reported: since Fourteenth Amendment applies to Girard College, City may spend tax funds to conduct instant litigation).

II. There Is No Merit In Any of Petitioners' Five Supposed Reasons for Granting Certiorari.

A. *Shelley v. Kraemer.* First, *Shelley v. Kraemer,* 334 U. S. 1, was an alternative ground for the decision below. Second, in so far as that decision relies on *Shelley,* it is well within the *Shelley* principle. In *Shelley* the court in question merely applied neutral principles of law in a litigation contested on both sides by private parties. Here the Orphans' Court of Philadelphia *sua sponte* and *ex parte* created a device for preventing a willing "seller" of education (the Board of City Trusts, as trustee of Girard College, which by virtue of this Court's decree had to be "willing")

from giving such education to willing "buyers" of the education (the Negro applicants). This case is ruled by *Shelley a fortiorari.* See also *Sweet Briar Institute v. Button,* 387 U. S. 423 and, *on remand,* 12 Race Rel. L. Rep. 388 (1967). Surely if it was unconstitutional for the Attorney General of Virginia to seek to prevent Sweet Briar from admitting Negro girls, as Petitioners concede, it was equally so for the Orphans' Court to prevent the City of Philadelphia (ordered by this Court in 1957 to cease discrimination) from admitting the Negro boys in the first Girard litigation.

B. *Evans v. Newton.* The undisputed facts set forth above in the Counterstatement of the Case—when contrasted with the bare record in *Evans v. Newton,* 382 U. S. 296, which came before this Court without an evidentiary hearing—demonstrate without need for further argument that this case is controlled *a fortiori* by *Evans.* It need only be noted, in connection with Petitioners' argument that a park is more "public" than a school, that all states compel school attendance but certainly do not compel the use of parks.

C. *Reitman v. Mulkey.* Petitioners contention that so-called "neutral" principles of common law were applied to Girard College by the Orphans' Court, in contrast to the constitutional enactment reviewed in *Reitman v. Mulkey,* 387 U. S. 369, is belied by the record here. As Judge Kalodner correctly pointed out in his concurring opinion below:

> "In the instant case, the Orphans' Court had two alternative courses of action following the ruling of the Supreme Court of the United States in Pennsylvania v. Board of Directors of City Trusts, 353 U. S. 230 (1957), that the Board's denial of admission to Girard College of negro male orphans pursuant to the racial

exclusionary clause of Stephen Girard's Will constituted state action in violation of the Fourteenth Amendment.

> "The Orphans' Court could have pursued the alternative of directing the Board of Directors of City Trusts to admit negro orphans to Girard College. Instead, it *sua sponte* pursued the alternative course of removing the Board and appointing individual private trustees in its stead so as to permit continuance of the discriminatory admission policy dictated by Girard's Will." (A66-67)

As Judge Kalodner noted, a *choice* of "neutral" principles was open and the choice of the one favoring segregation was therefore a non-neutral act and forbidden by the Fourteenth Amendment.

D. *Burton Revisited.* While the trustees purport to mount a legal attack on the significance of the City's historical and continuing relationship to Girard College, they do not contravene the record basis of the factual findings of the District Court, affirmed by the Court of Appeals *en banc.* This Court, reading the Counterstatement of the Case above, will have no difficulty seeing that the state contacts here are enormously greater than analogous contacts in such recent cases as *Burton v. Wilmington Parking Authority,* 365 U. S. 715, *Peterson v. City of Greenville,* 373 U. S. 244, *Lombard v. Louisiana,* 373 U. S. 267, *Robinson v. Florida,* 378 U. S. 153 and *Mason v. City of Biloxi,* 385 U. S. 370, *reversing per curiam* 184 So. 2d 113 (Miss. 1966).

The history recited in the Counterstatement of the Case shows an example of the State making possible in 1968 the practice of racial discrimination at an educational

institution open to a significant part of the American community ("*any* needy fatherless boy—as long as he is 'white'" (488a, 867-68a)). This century and one-third of affirmative State action, including actual construction of the facilities, far exceeds the half century of merely custodial care by the City of Macon, Georgia, using funds of the testator to maintain park grounds in *Evans*. It far exceeds the purely "moral" support given private golf courses and swimming pools to which the state retains only the right of a reverter. *E.g., Hampton v. Jacksonville,* 304 F. 2d 320 (5th Cir. 1962). It far exceeds the recent support given wholly private hospitals which have accepted some supplementary State monies. *E.g., Eaton v. Grubbs,* 329 F. 2d 710 (4th Cir. 1964). It is incomparably greater than the possible effect of an ordinance requiring separate but equal washrooms for restaurant *employees* upon a segregationist restaurant owner's refusal to serve Negro *customers*. *Robinson v. Florida, supra.* In all these cases the institutions and the private racial prejudice would still exist, even if the State involvement were not present. Not so with Girard College, where, but for the actions of the State there would be no institution in 1968 and no racial discrimination in 1968.

E. *The Effect of This Court's Earlier Mandate.* Petitioners' attempt to argue that this Court's 1958 denial of certiorari to review the actions of the Philadelphia Orphans' Court in substituting "private" trustees in order to prevent admission of Negroes, constituted a substantive ruling approving that action. One of the clearest precedents in this Court is that denial of certiorari indicates no ruling on the merits. *E.g. United States v. Carver,* 260 U. S. 482, 490; *Polites v. United States,* 364 U. S. 426, 433 n. 9. This rule has been applied equally when a remand is involved. *E.g. United States v. Schubert,* 348 U. S. 222, 228-29. Since this

Court does not grant certiorari and decide major constitutional questions (as in the *Board of Directors* case *supra*) for the purpose of instructing state courts on the proper common law device by which to perpetuate segregation, the earlier denial of certiorari obviously reflected one of the following factors:

1. Much of the history set forth in the Counterstatement of the Case here was not before the Orphans' Court or this Court in the earlier litigation.

2. No application was made by the Negro plaintiffs in the earlier litigation to the "substituted" trustees, and consequently there had been no refusal of admission of Negroes by those trustees. Thus, the federal question may not have been properly presented. See Justice Black's Opinion in *Evans v. Newton,* 382 U. S. 296; compare *Naim v. Naim,* 350 U. S. 891, with *Naim v. Naim,* 197 Va. 734, 90 S. E. 2d 849 (1956), and *Naim v. Naim,* 350 U. S. 985; and see *Loving v. Virginia,* 388 U. S. 1.

In addition:

3. The Supreme Court of Georgia in *Evans v. Newton,* 220 Ga. 280, 138 S. E. 2d 573 (1965), expressly held, as the Petitioners now contend, that the denial of certiorari in the second *Board of Directors* case was a holding that this Court had approved substitution of Trustees as a device for maintaining segregation. This Court of course reversed. *Evans v. Newton,* 382 U. S. 296.

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated May 2, 1968.

APPELLEES' APPENDIX

EXCERPTS FROM TESTIMONY OF R. R. RANDALL.

(762) ROLAND RODROCK RANDALL, sworn.

DIRECT EXAMINATION.

BY MR. COLEMAN:

* * * * * * * * *

(767) Q. Subject to checking, Mr. Gaffney when he was representing the defendants before Judge Klein on May 11, 1966, said: "Since 1963 the Trustees have collected no income whatever from the building on Market Street and exactly $100 from the building on 11th Street, and their expenses have been over $600,000 over that period"; is that correct?

A. I would subscribe to that.

* * * * * * * * *

(770) Q. When Snellenburg moved out, I take it the defendants were then faced with the problem of trying to lease the space to someone else.

A. We certainly were.

Q. Did this come under your committee?

A. Yes, sir.

Q. And did you go out and attempt to induce another store to come in and take over the premises?

A. We went every place we could.

Q. You were unsuccessful.

A. That is right.

Q. You couldn't find anyone who would be able to take over the whole store.

A. We couldn't find any department store willing to take it over entirely, and we covered practically everybody in the country and a couple of prospects outside of the country and one Japan firm.

(771) Q. In other words, it was impossible for you to rent this premises to a store.

A. Finally we thought that was the case, possibly the size of the store was uneconomic for that location and that type building.

Q. During this time, save what you were getting from Sley and from Sam Goody, you were getting no other income; is that right?

A. That is right.

Q. But, on the other hand, there were expenses which were continuing?

A. Oh, yes.

* * * * * * * * *

EXCERPT FROM MINUTES OF BOARD OF TRUSTEES (P-7).

INSPECTION TOUR OF GIRARD COLLEGE

The Judges of the Orphans' Court of Philadelphia County and the Trustees of the Estate of Stephen Girard, Deceased, inspected Girard College on Friday, April 21, 1961, at 12:00 Noon.

Present were the following:

Judges of the Orphans' Court
Hon. Charles Klein, President Judge
Hon. Robert V. Bolger
Hon. Mark E. Lefever
Hon. Kendell H. Shoyer

Excerpt from Minutes of Board of Trustees (P-7)

Hon. Joseph D. Burke
Hon. Harold D. Saylor was absent.

Trustees of the Estate of Stephen Girard, Deceased
Mr. Revelle W. Brown
Mr. John A. Diemand
Dr. Gilson Colby Engel
Mr. Walter S. Franklin
Walter B. Gibbons, Esq.
Hubert J. Horan, Jr., Esq.
Dr. Louis P. Hoyer
Mr. Frederick H. Levis
David H. Maxwell, Esq.
Mr. Roland Rodrock Randall
Mr. Harry G. Schad
Morris Wolf, Esq.
Mrs. Mina F. Oliver

Also present were:
Dr. Karl R. Friedmann
Mr. William Jamison
Mr. W. H. Gillam, Jr.
Mr. Blackwell Newhall
Mr. Kent L. Roberts
Mr. James J. Hagan
Mr. George S. Hoffman
Mr. W. Parkes Millington
Thomas J. Gaffney, Esq.

During luncheon Certificates of Appointment, signed by all six of the present Judges, were presented to each of the Trustees by President Judge Klein.

EXCERPT FROM MINUTES OF BOARD OF TRUSTEES (P-8).

INSPECTION OF GIRARD COLLEGE

The Judges of the Orphans' Court of Philadelphia County inspected Girard College on Thursday, December 3, 1959, at 10:00 a.m.

Present were the following:

Judges of the Orphans' Court
Hon. Charles Klein, President Judge
Hon. Robert V. Bolger
Hon. Kendall H. Shoyer
Hon. Harold D. Saylor
Hon. Mark E. Lefever

Trustees of the Estate of Stephen Girard, Deceased
Mr. Revelle W. Brown
Mr. John A. Diemand
Mr. Walter S. Franklin
Mr. Walter B. Gibbons
Mr. Hubert J. Horan, Jr.
Dr. Louis P. Hoyer
Mr. Roland R. Randall
Mr. Harry G. Schad
Mr. Morris Wolf
Mrs. Mina F. Oliver

Absent:
Dr. Gilson C. Engel and Mr. Frederick H. Levis were out of the city,
Mr. David F. Maxwell was ill.

Also present were:
Dr. Karl R. Friedmann
Mr. William Jamison
Mr. W. H. Gillam, Jr.
Mr. Blackwell Newhall

LETTER OF JUDGE ROBERT V. BOLGER (P-55).

April 11, 1963.

Mr. John A. Diemand, Chairman
Insurance Company of North America,
1600 Arch Street,
Phila., Pa.

Dear John:

At the conference of the Judges of the Orphans' Court this morning, President Judge Klein asked me to send you the enclosed anonymous communication which came to James M. Marsh, Esq., who, you may remember, was the amicus curiae in the Girard College case. Neither Mr. Marsh nor anybody else knows the source of this communication.

The Court has asked me to request that you give the matter contained therein the attention which you think it deserves and kindly let us have your comments.

Very sincerely yours,

R. V. B.

Excerpt from Minutes of Board of Trustees of April 19, 1963 (P-25)

Excerpt from Minutes of Board of Trustees of May 17, 1963 (P-26)

EXCERPT FROM MINUTES OF BOARD OF TRUSTEES OF APRIL 19, 1963 (P-25).

President Diemand opened the meeting and referred to a letter dated April 11, 1963 to him from Judge Robert V. Bolger of the Orphans' Court of Philadelphia together with its anonymous enclosure dated March 1, 1963, and the General Manager's comments thereon (filed in the Secretary's Letters and Reports).

Mr. Diemand said that he had told the Judge that he would see that all Trustees received a copy of the letter and that he would inform the Judge of the action taken by the Board.

After thorough discussion of the matter it was moved by Mr. Fox, seconded by Mr. Gibbons and passed, that the President of the Board furnish the President of the College a copy of the letter and thereafter discuss it with him.

EXCERPT FROM MINUTES OF BOARD OF TRUSTEES OF MAY 17, 1963 (P-26).

President Diemand asked Dr. Hoyer to read a report on the results of the investigation of matters set forth in the anonymous communication which accompanied Judge Bolger's letter of April 11, 1963, after which the Board concluded that they are without foundation in fact and requested President Diemand to so inform the Court.

Debate in the Pennsylvania Senate on Act of November 19, 1959 (1959 Legislative Journal 3586 (Excerpt from P-51)

DEBATE IN THE PENNSYLVANIA SENATE ON ACT OF NOVEMBER 19, 1959, P. L. 1526 (1959 LEGISLATIVE JOURNAL 3586) (EXCERPT FROM P-51).

MR. BERGER: Mr. President, this bill is more in the nature of tidying up a bill than anything else. It is entirely consistent with the law as enunciated by the Supreme Court. The Philadelphia Bulletin, of Sunday last, I believe stated in part as follows:

> "The Orphans' Court has questioned the propriety of the Board of City Trusts still serving as guardian for boys at Girard College and for its graduates not yet 21 years old.
>
> "President Judge Charles Klein yesterday told the City Solicitor's office it is high time some definitive action was taken to clear up the situation which is a hangover from the board's former position as the city agency administering Girard College.
>
> "It is inconceivable that the city should maintain it can act as state guardian now . . . in light of the stand it took during the recent litigation over the Girard issue, Judge Klein said.
>
> "Such a position would give the city solicitor the appearance of talking out of both sides of his mouth at once, he added."

Mr. President, without reading any more of the article, this bill is simply to make consistent the guardianship of the orphan boys at Girard College and to remove from the Board of City Trusts the guardianship and place it in the hands of the trustees appointed by the Orphans' Court.

MR. WEINER: Mr. President, this is a serious matter and I do not want to inject any levity into it. However, apropos of what Senator Berger just said, it is reminiscent of a very famous story, which most of you have heard, about the

Debate in the Pennsylvania Senate on Act of November 19, 1959 (1959 Legislative Journal 3586 (Excerpt from P-51)

city lawyer who received a call from a friend of his from the country about a client being charged with a crime. As the lawyer was proceeding from his office in the city out to the country, where this case was going to be heard by a country squire, he happened to pick up what is known as advanced notes, which are books that are printed in sort of a contemporary form, like a magazine, and which give all the recent cases as they come down from the higher courts. Noting on the first page a case which fitted directly to the case in point, the one out in the country, he took this book with him and ran out to the squire. As he was listening to the case and the case came to an end, he realized that his case was on all fours in this little booklet. He said, therefore, to the squire, "Before you pronounce judgment or take any action, I want to show a very recent decision. He read this case out of this little book. Whereupon, the squire said, "I do not know how the city lawyers practice, but we do not take our law out of magazines."

I would like to say to the gentleman, Mr. President, that I would rather not take the law out of a newspaper. If President Judge Charles Klein feels this is so important, I think he should be in touch with the gentlemen here who have come from Philadelphia. I think he should write us a letter or two. I do not know of anyone who has received any communication from him. However, if he wants to practice law or tidy up his business in the Philadelphia newspapers, it is all right with me and I guess he can do that. However, I think it might be a little bit better if he contacted some of the people here.

I said originally that I, personally, feel this tidying up is not in keeping with the thinking that I have on this matter. I do not want to be part of this tidying up procedure.

Therefore, Mr. President, I desire to be recorded as voting "no" on this legislation.

* * * * * * * * *

Certificate presented to John A. Diemand by the Judges of the Orphans' Court (P-54A)

Commonwealth of Pennsylvania

In The Orphans' Court of Philadelphia County
Estate of Stephen Girard, Deceased

To all to whom these presents may come, Greeting:

Reposing special trust and confidence in the Character, Integrity and Ability of

John A. Diemand

he has been appointed

A Trustee of
The Estate of Stephen Girard

with all the rights, privileges, honors and duties thereunto appertaining.

Dated:
October 4, 1954

By the Court

Edwin O. Bolger — President Judge

Harold G. Knight

Clark C. Knight

Joseph C. Bell — Judges

Kendall N. Shoyer — Judges

(9b)

TABLE OF INSURABLE VALUES OF PROPERTIES OF THE GIRARD ESTATE (P-69).

INSURABLE VALUES

	Properties Formally Valued		Properties on Which Formal Valuation Is Not Required		
	100% Sound Insurable Value	Date of Valuation	Total Insurance Carried	Co-Insurance Clause	Imputed Insurable Value
Warehouses (Church St. & N. Front St.)			$310,550	80%	$388,188
Dwellings (Poplar St., N. 25th St., Girard Ave.)			139,500	——	174,375
23-27 S. 11th St.			139,700	80%	174,625
34-40 S. 11th St.	$6,202,270	Feb. 22, 1967			
1101-53 Chestnut St.	5,705,754	March 1, 1967			
21 S. 12th St.	4,112,396	March 1, 1967			
1100-42 Market St.	4,299,931	Feb. 22, 1967.			
S. Philadelphia (Garages and Moyamensing Ave.)			172,800	80%	216,000
Girard College	41,854,500	Feb. 20, 1967			
Schuylkill & Columbia Counties			31,000	80%	38,750
	$62,174,851				$991,938

Summary

Formal Valuations	$62,174,851
Imputed Valuations	991,938
	$63,166,789

Letter of Joseph P. Gaffney, Attorney for the Board of Directors of City Trusts (D-7)

LETTER OF JOSEPH P. GAFFNEY, ATTORNEY FOR THE BOARD OF DIRECTORS OF CITY TRUSTS (D-7).

May 31, 1950

Commonwealth of Pennsylvania
Department of Public Instruction
State Board of Private Academic Schools
Harrisburg 1, Pennsylvania.

Att: R. A. Rosenberry, Chief

Re: Girard College, Phila., Penna.

Dear Sir:

Your letter of May 15, 1950, sent to Girard College, Philadelphia, Pennsylvania, relative to the Act of June 25, 1947, P. L. 951, has been submitted to me as Solicitor for The City of Philadelphia, Trustee under the Will of Stephen Girard, Deceased, acting by and through the Board of Directors of City Trusts, for purpose of reply.

Girard College is owned, administered, operated and maintained by The City of Philadelphia, acting through a municipal department, to wit, the Board of Directors of City Trusts, created by the Act of June 30, 1869, P. L. 1276 (53 P. S. sec. 6481-6486) (see Phila. v. Fox 64 Pa. 169) which administers the Estate of Stephen Girard, deceased. Poor, white male orphans between the ages of six and ten years are admitted, given a course which includes both high school and manual training and remain until they arrive at between fourteen and eighteen years of age. Admittance of the said orphans to Girard College is governed by Clause XXI, of the Will of Stephen Girard (see pages 16 and 17 of enclosed booklet) and by the Act of Feb. 27, 1847, P. L. 178,

Letter of Joseph P. Gaffney, Attorney for the Board of Directors of City Trusts (D-7)

§1, etc., 53 P. S. 6792, et seq. (see booklet pages 35 and 36). The educational instruction offered in the College is provided for by the income of the trust estate and not for a consideration, profit or tuition.

While I entertain no doubt that the Act of June 25, 1947, P. L. 951, has no application to Girard College, in view of the definition of "private school" or "school" contained in Section 1 (a) of the Act, in order that your records may properly reflect the status of Girard College, this statement is submitted.

There is no employment of solicitors, The City of Philadelphia acting by the Board of Directors of City Trusts, performs the duties required of it by the Will of Stephen Girard and said Act of 1847, in selecting students for the College. Neither said Board nor Girard College employ any persons to solicit individuals to enroll in the College.

If you have any further questions with regards to this matter please write me.

Very truly yours,

Joseph P. Gaffney

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MAY 8 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1331

REVELLE W. BROWN, JOHN A. DIEMAND, DR. GILSON COLBY ENGEL, FRED FOX, WALTER S. FRANKLIN, WALTER B. GIBBONS, ESQUIRE, HUBERT J. HORAN, JR., ESQUIRE, DR. LOUIS P. HOYER, FREDERICK H. LEVIS, DAVID F. MAXWELL, ESQUIRE, MRS. MINA F. OLIVER, ROLAND RODROCK RANDALL and HARRY G. SCHAD, Trustees of the Estate of Stephen Girard,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA and ALAN LEVI BOND, by his mother, MRS. RUBY BOND, CHARLES WILLIAM HICKS and THEODORE LEWIS HICKS, by their mother, MRS. MARIE HICKS, JAMES SCRUGGS, and HENRY SCRUGGS, by their mother, MRS. ARDELLA SCRUGGS, TYRONE KARL WHITE and TERRY SHERWOOD WHITE, by their mother, MRS. CHARLOTTE L. WHITE, on behalf of themselves and all others similarly situated,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Of Counsel:

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Peterson v. *City of Greenville*, 373 U. S. 244 (1962) 5

Robinson v. *Florida*, 378 U. S. 153 (1964) 5

I. The City's Historical Relationship of Trustee, Which Was Terminated in 1959, Does Not Now Import State Responsibility For the Acts of the Present Private Trustees.

Respondents' principal reliance is placed, not upon the *present* relationship between the City and the trust, but upon the past relationship, which terminated upon the removal of the City as trustee in 1959 (pages 3-12 of Respondents' Brief in Opposition).[1] This argument is prefaced with the sweeping assertion that Petitioners do not disagree with the finding of the District Court that the Commonwealth and the City have given " . . . aid, assistance, direction, and involvement to the construction, maintenance, operation and policies of Girard College." (page 3 of Respondents' Brief in Opposition). To the extent that this statement refers to such matters as exemption from taxes and tort liability which were or are common to *all* charities, Petitioners agree, but, to the extent the statement implies a special significant State involvement with Girard College prior to 1959, the undisputed facts are to the contrary.

Stephen Girard established the City of Philadelphia as the trustee of his residuary trust by naming to that position "the Mayor, Alderman and Citizens of Philadelphia, their

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[1]Respondents' only reference to an alleged contact between city and trust which has occurred subsequent to 1959 is directed to the lease by petitioners, in 1963, of certain real estate to the Community College of Philadelphia. (Footnote 8, p. 9 of Respondents' Brief in Opposition). The District Court found, as a fact, that this lease was executed after arms-length bargaining, including the taking of competitive bids, and did not constitute State assistance within the meaning of the Fourteenth Amendment. (A52). Respondents do not challenge this finding.

successors and assigns,"[2] (R. 44a). The Pennsylvania Supreme Court has said that he did so merely in order to obtain a perpetual trustee—there being no trust companies yet in existence—and has held that the identity of the trustee was otherwise not important to Girard. *Girard Will Case,* 386 Pa. 548, 568-569, 127 A. 2d 287, 296 (1956); *Girard College Trusteeship,* 391 Pa. 434, 444, 138 A. 2d 844, 848 (1958).[3]

In acting as trustee the City did so merely as a fiduciary. The Pennsylvania Supreme Court held in the *Girard Will Case, supra,* (386 Pa. at 561, 127 A. 2d at 293):

> "It is true that Girard appointed the City of Philadelphia as the trustee to administer the trust according to the terms of his will, but he certainly did not

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[2]Respondents argue that the Commonwealth played an essential role in the establishment and administration of the trust because of certain legislation which they cite. (Respondents' Brief in Opposition, pp. 9-10). This same legislation had been cited to the Pennsylvania Supreme Court in *Girard College Trusteeship, supra,* and was there disposed of as follows (391 Pa. at 445-446, 138 A. 2d 844, 849 (1958)) in an opinion by Chief Justice Charles Alvin Jones: "The statutes and ordinances which the appellants urge as having made a public trust of Girard College did not so operate. Certain it is that no additional legislation was required to clothe the City with the fiduciary powers necessary for the administration of Girard College . . . The legislative enactments which the appellants stress were designed in large part to enable the Commonwealth and the City to receive and use for their governmental purposes pecuniary legacies bequeathed directly to them by Girard's will. The rest of the legislative enactments were purely administrative measures neither envisioned nor required by Girard's will. And, the same can be said for the ordinances which the appellants cite."

[3]Respondents' counsel would have this Court believe that Girard was primarily interested in benefiting the City (Respondents' Brief in Opposition, p. 4). To the contrary, the Will shows that his primary interest was the College and that he was interested in the general welfare of the City only secondarily (R. 44a). The Pennsylvania Supreme Court has held that Girard's dominant purpose was the establishment of the College. *Girard Will Case,* 386 Pa. at 568, 127 A. 2d at 296.

> intend thereby to empower it to conduct such administration in its *public or governmental capacity*, or to bring into play any of its *proprietary* rights, since it is merely the title holder of Girard's property and not its beneficial owner. As a *trustee* it was to act and could act only in a *fiduciary* capacity, exercising no State or governmental function or power in the slightest degree, but being limited to the same rights, powers and duties, no more and no less, as those of any private individual or trust company acting as trustee."

This then is the law of Pennsylvania. The City exercised no governmental power or authority over the school or the trust assets, nor did it have any proprietary interest, during the period of its trusteeship. Its role was no greater and no different than that of an individual trustee. The beneficial ownership of the trust assets was never in the City. Accordingly, those assets have never been impressed with state or governmental characteristics, and the removal of the City from its position as trustee terminated state involvement.

The limited constitutional implication of the involvement of a municipality merely as a trustee is best evident from the prior two appeals to the Supreme Court. As the Supreme Court said in *Evans*, the first Girard case decided that the Equal Protection Clause "bars a city from acting as a trustee under a private will which serves the racial segregation cause." (382 U. S. at 298).[4] After the state agency

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[4]To the same effect is Chief Justice Warren's statement for the majority in *Griffin* v. *State of Maryland*, 378 U. S. 130, 136 (1964): "The Board of Trusts Case [The Girard Case] must be taken to establish that to the extent that the State undertakes an obligation to enforce a private policy of racial segregation, the State is charged with racial discrimination and violates the Fourteenth Amendment."

had been removed as trustee, and the refusal to admit could no longer be the state's refusal, the next appeal was dismissed and the petition for certiorari denied.[5]

Despite the fact that the City was acting only as a trustee, Respondents' counsel have endeavored to create the impression that the City and the State are solely responsible for the present College and the present trust assets. It has been argued that "but for" the actions of the City and the Commonwealth there would be no Girard College and there would be no multi-million dollar estate. (Respondents' Brief in Opposition, p. 11). Nothing could be further from the truth. The College and the trust assets are probably no different, and certainly no better or greater, than they would have been if private persons had been the trustees throughout.

Although the City as trustee gave the necessary orders to cause the construction of Girard College, it did so only in response to Girard's directions, with Girard's money, and as Girard's testamentary agent. This is totally unlike the conceiving, planning, constructing and financing of the public parking complex by the governmental authority in *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 (1961).

Contrary to Respondents' contention, the past relationship between the City and the Trust is not *"Burton* Revisted." (Respondents' Brief in Opposition, p. 18). This Court clearly held, in *Burton,* that the quality of State in-

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[5]Respondents' argument (Respondents' Brief in Opposition, p. 20) that the Supreme Court of Georgia, in *Evans* v. *Newton,* 220 Ga. 280, 138 S. E. 2d 573 (1965) ". . . expressly held . . . that the denial of certiorari in the second *Board of Directors* case was a holding that this Court had approved substitution of Trustees as a device for maintaining segregation," and that this Court reversed such a holding, is directly contrary to fact. The Supreme Court of Georgia made no such finding, and this Court did not discuss the second *Board of Directors* case in *Evans.*

volvement, not the mere volume, determines State action. In *Burton,* since it could be said without dispute that *but for* the government there would have been no restaurant, the State was significantly involved, and, accordingly, State action was present. In this case it is equally clear that *but for* Stephen Girard, rather than the City, there would be no Girard College.[6]

The fact of the matter is that the City's only interest in Girard College was that of a testamentary agent of Stephen Girard. Not a penny of public money nor an ounce of public power went into the building of the College or the administration of the trust. The suggestion of the Respondents that the buildings be torn down and the assets given away if the trust is to be purged of its "public character" is sheer nonsense. The trust never had governmental characteristics—only the trustee, and it was removed long ago.

---

[6]None of the restaurant sit-in cases cited by Respondents is conceivably in point. In those cases the city or state had either legislated against mixed eating or had by statement of policy or regulation made it impossible or difficult to obtain desegregated service. *Peterson* v. *City of Greenville,* 373 U. S. 244 (1962); *Lombard* v. *Louisiana,* 373 U. S. 267 (1962); *Robinson* v. *Florida,* 378 U. S. 153 (1964); *Mason* v. *Biloxi,* 385 U. S. 370 (1966). Here, there never has been any legislation encouraging discrimination, and both the City and State have been actively engaged since 1956 in attempting to expand Girard's gift to include Negroes. In *Eaton* v. *Grubbs,* 329 F. 2d 710 (4th Cir. 1964), the hospital there involved had been given by the city to the hospital corporation; the city had the right of reverter if it was not continued as a hospital; the corporation had the power of eminent domain; the city and county regularly appropriated money for the operation of the hospital, and two new wings had been built with government funds. In *Hampton* v. *Jacksonville,* 304 F. 2d 320 (5th Cir. 1962), the city, having been directed to desegregate its public golf course, conveyed the course to private operators with a reverter in the event that it was not forever maintained as a course. Here the original property was Girard's, and all moneys expended in construction and operation have been derived from the principal or income of his gift.

CONCLUSION

Respondents are clearly in error when they contend that no important Federal question is presented by this Petition. (Respondents' Brief In Opposition, p. 15). To the contrary, as is demonstrated in the Petition, this proceeding raises substantial questions which will affect, and possibly change, the formerly well-settled law governing testamentary charitable dispositions and private education.

For the foregoing reasons, in addition to those contained in the Petition, the Petition should be granted.

Respectfully submitted,

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